No. 90-5551-CSH
Status: GRANTED
CAPITAL CASE

Title: Edward Harold Schad, Jr., Petitioner
v.
Arizona

Docketed:
August 16, 1990

Court: Supreme Court of Arizona

Counsel for petitioner: Young,Denise I.

Counsel for respondent: Ford,R. Wayne

Entry	Date	Note	Proceedings and Orders
1	Jul 10 1990	G	Application (A90-28) to extend the time to file a petition for a writ of certiorari from July 17, 1990 to August 16, 1990, submitted to Justice O'Connor.
2	Jul 11 1990		Application (A90-28) granted by Justice O'Connor extending the time to file until August 16, 1990.
3	Aug 16 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Sep 14 1990		Brief of respondent Arizona in opposition filed.
6	Sep 20 1990		DISTRIBUTED. October 5, 1990
8	Oct 9 1990		Petition GRANTED.
			**********
9	Nov 13 1990		Record filed.
		*	Supreme Court of AZ-1 vol.
10	Nov 23 1990		Record filed.
		*	Exhibits-1 vol., Superior Court, Yavapai County, AZ.
11	Nov 23 1990		Brief of petitioner Edward Harold Schad, Jr. filed.
12	Nov 30 1990		Joint appendix filed.
14	Dec 17 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 27, 1991. (1ST CASE)
15	Dec 21 1990		Brief of respondent Arizona filed.
16	Dec 21 1990		Brief amici curiae of Kentucky, et al. filed.
17	Dec 26 1990		Brief amicus curiae of United States filed.
18	Jan 9 1991		CIRCULATED.
19	Feb 8 1991	X	Reply brief of petitioner Edward Harold Schad, Jr. filed.
20	Feb 27 1991		ARGUED.

90-552

IN THE SUPREME COURT OF THE UNITED STATES

No._____

EDWARD HAROLD SCHAD, JR.

Petitioner,

v.

STATE OF ARIZONA

Respondent.

ORIGINAL

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner, Edward Harold Schad, Jr., a defendant under sentence of death, moves this Court to file the attached Petition for Writ of Certiorari without payment of costs and to proceed in forma pauperis. Petitioner's counsel has sent the attached affidavit of indigency to Petitioner but has not yet received the signed and notarized affidavit. For that reason, Petitioner requests an extension of time to file the signed and notarized affidavit. As the attached affidavit of counsel sets forth, Petitioner has had counsel appointed to represent him in all proceedings below and it is believed that he has no assets to pay these costs here. For these reasons, Petitioner requests that this Court allow him to proceed in forma pauperis.

Supreme Court, U.S.
FILED
Y-16-90
JOSEPH F. SPANIOL, JR.
CLERK

RECEIVED
AUG 2 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SPECTFULLY SUBMITTED this 16th day of August, 1990.

John M. Bailey
Arizona Capital
Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604
(602) 965-8185

Attorney for Petitioner

90-5551

AFFIDAVIT

ORIGINAL

:E OF ARIZONA)
) ss.
unty of Pinal)

I, EDWARD HAROLD SCHAD, JR., being first duly sworn, upon my oath, depose and state that I am the Petitioner in the above-entitled cause, that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner at the Arizona State Prison.

2. That within the last twelve months I have not received any income from any business, profession or self-employment, nor do I receive any interest, dividends, or other source of income.

3. That I have no checking or savings account and the only cash with which I am possessed is that which is within my prison account, which is of a minimal amount.

4. That I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

Supreme Court, U.S.
FILED
8-14-90
JOSEPH F. SPANIOL, JR.
CLERK

AUG 27 1990

That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

Edward Harold Schad, Jr.
EDWARD HAROLD SCHAD, JR.

SUBSCRIBED AND SWORN to before me this 20th day of August, 1990.

Notary Public

My commission expires:
My Commission Expires March 29, 1993

90-5551

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD HAROLD SCHAD, JR.

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A CAPITAL CONVICTION OBTAINED WITHOUT PROVIDING FOR A UNANIMOUS, OR EVEN MAJORITY VOTE BY THE, JURY VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS?

II. WHETHER A STATE MAY AVOID A DEFENDANT'S EXERCISE OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER BECK V. ALABAMA BY DENYING THAT A NECESSARILY INCLUDED OFFENSE IS A "LESSER INCLUDED OFFENSE" UNDER STATE LAW?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD HAROLD SCHAD, JR.

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, Edward Harold Schad, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered on December 14, 1989.

OPINION BELOW

The opinion of the Arizona Supreme Court is not yet officially reported but is attached as Appendix "A" to this petition.

JURISDICTION

The judgment of the Supreme Court of Arizona affirming

Petitioner's conviction and sentence was entered on December 14, 1989. Petitioner filed a motion for reconsideration which was denied on April 17, 1990. See Order denying Petitioner's Motion for Reconsideration, attached as Appendix "B" to this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> U.S. Const. amend. VI: In all criminal prosecution, the accused shall enjoy the the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . .
>
> U.S. Const. amend. VIII: Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> U.S. Const. amend. XIV: No state shall ... deprive any person of life, liberty, or property, without due process of law ...

STATEMENT OF THE CASE

On June 27, 1985, Petitioner was found guilty of first degree murder. At trial, the state presented evidence that on August 1, 1978[1], Larry Grove left Bisbee, Arizona en route to Washington. On August 9, 1978, Mr. Grove was found dead in Prescott, Arizona, as a result of strangulation. The Petitioner, when arrested several months later on unrelated charges, was in possession of several of

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[1]The Petitioner was originally tried, convicted, and sentenced to death in 1979. That conviction and sentence were subsequently set aside because the jury was instructed on felony murder without any definition of the elements of the underlying felony. State v. Schad, 142 Ariz. 619, 691 P.2d 710 (1984).

Mr. Grove's belongings[2]. While in custody on the unrelated charges, Petitioner stated to another inmate that he would "deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona." This statement[3] was made without reference to date, context or purpose -- indeed, it was made before the petitioner was considered by anyone, including the fellow inmate questioning him, to be a suspect in this case.[4]

At the conclusion of petitioner's trial, the jury was instructed on premeditated and felony murder. See Appendix "C". Both premeditated and felony murder constitute first degree murder under Arizona law. A.R.S. Section 13-703. The jury was instructed on the elements of robbery as part of the felony murder instruction, but was not given a verdict form on robbery. The guilty verdict form returned by the jury did not specify whether the jury found Petitioner guilty of premeditated or felony murder or whether there was any agreement in the jury between the two. See Appendix "D".

After a one day sentencing hearing, the Petitioner was

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[2]These belongings included credit cards and a car.

[3]The Arizona Supreme Court labelled this statement as the "most incriminating" of the statements that petitioner made.

[4]No argument was made below that this nebulous statement and possession of a homicide victim's property was insufficient evidence to convict a person of first degree murder and sentence that person to death. This is unfortunate give the Arizona Supreme Court's most recent pronouncement on the subject. See State v. Mathers, __ Ariz. __, __ P.2d __, (slip opinion June 26, 1990) (conviction and death sentence set aside and judgment of acquittal entered by the Arizona Supreme Court based on insufficiency of the evidence).

sentenced to death. See Appendix "E".

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues that Petitioner raises in this petition concern fundamental constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. All of these issues were presented to the Arizona Supreme Court in Petitioner's appellate briefs challenging his conviction and death sentence. In a written opinion, the Arizona Supreme Court rejected those federal constitutional claims and affirmed the conviction and death sentence. See Appendix "A", pp. 11-13.

REASONS FOR GRANTING THE WRIT

I. THE JURY INSTRUCTION AND VERDICT FORM UTILIZED IN THE PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER CONFLICT WITH THE LAW OF OTHER STATE AND FEDERAL JURISDICTIONS AND DENIED THE PETITIONER HIS RIGHT TO A UNANIMOUS VERDICT AND TO PROOF BEYOND A REASONABLE DOUBT OF ALL THE ELEMENTS OF THE OFFENSE.

In Arizona, a person is guilty of first degree murder if

> Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation" or if "acting either alone or with one or more other persons, such person commits or attempts to commit sexual conduct with a minor ... sexual assault ... molestation of a child ... narcotics offenses ... kidnapping ... burglary ... arson ... robbery ... escape ... or child abuse ... and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.
>
> A.R.S. Section 13-1105.B.

Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for

the commission of any of the enumerated felonies. First degree murder is punishable in Arizona by death or life imprisonment without the possibility of parole for either 25 or 35 years[5]. A.R.S. Section 13-703.

The Petitioner was indicted under both of the alternative theories of first degree murder. See Appendix "F". Within the confines of the scant inculpatory evidence presented against the petitioner, see infra, pp. 2-3, the prosecutor argued that the jury could find the petitioner guilty of first degree murder under either a premeditated or felony murder theory. See Appendix "G". The court likewise instructed the jury on both premeditated and felony murder. See Appendix "C". The court specifically told the jury that their verdict must be unanimous only as to guilt or innocence. The verdict form provided only that the jury found the petitioner guilty or not guilty of first degree murder. See Appendix "E".[6]

The Supreme Court of Arizona rejected the Petitioner's argument that submitting one verdict form on first degree murder, while instructing the jury on both premeditated murder and felony murder violated his constitutional right to a unanimous jury verdict. The court stated, "(i)n Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated

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[5]This distinction is dependent upon the age of the victim.

[6]Although petitioner's trial counsel did not object to the verdict form, petitioner's appellate counsel raised the issue on appeal and the Supreme Court of Arizona decided it on the merits. See Appendix "A" pp. 12-13.

murder or a felony murder. Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." Appendix "A" pp. 12-13 (citations omitted).

This line of reasoning by the Arizona courts is most fully illuminated in State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988). There the court stated, "[a]dmittedly, we do not know which of the three theories offered by the State the jury used to convict the defendant. The first theory was that the murder was premeditated and deliberate. The second was that the defendant had hid in the shed and was "lying in wait," and when the victim approached, he shot him. The third theory was that the defendant killed the victim in the course of a robbery. It is not necessary to know which of the three theories the jury relied upon in reaching its decision nor whether the jury relied on only one or more than one." Arnett, 760 P.2d at 1069.

This holding by the Arizona Supreme Court directly conflicts with the holdings of other federal and state jurisdictions that have reviewed this question and violates Petitioner's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process under the United States Constitution.

A. JURY UNANIMITY IN CAPITAL CASES IS REQUIRED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS APPLIED TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Contrary to the position taken by the Arizona Supreme Court

in Petitioner's case, juror unanimity in a capital case encompasses more than mere agreement on a verdict offering several means towards an end. Jurors must be in agreement as to the specific acts that a defendant committed to return a unanimous verdict.

Federal courts have long held that the jury must reach unanimity on the facts in issue, to convict a defendant. The first federal court of appeals to consider this issue[7] was United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). Using this Court's opinion in In re Winship, 397 U.S. 358 (1970) for guidance, the court in Gipson reasoned that "[t]he unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Gipson, 553 F.2d at 457, quoting In re Winship, 397 U.S. at 364. The court went on to say that "(r)equiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F.2d at 458.

Other courts, both federal and state, have found the reasoning of Gipson persuasive. See e.g. United States v. Beros, 833 F.2d 455 (3rd Cir. 1987) ("persuaded by the analysis and rationale" of Gipson, the court held that"[w]hen the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the

[7]See Case Comment, Right To Jury Unanimity On Material Fact Issue: United States v. Gipson, 91 HARV.L.REV. 499 (1977).

satisfaction of the entire jury."); United States v. Payseno, 782 F.2d 832 (9th Cir. 1986) (general unanimity instruction is not sufficient when different theories of guilt are presented to jury, citing Gipson); State v. Boots, 308 Or. 371, 780 P.2d 725 (1989) (citing Gipson for authority in reversing defendant's capital murder conviction); Probst v. State, 547 A.2d 114 (Del. 1988) (holding "(t)he Sixth Amendment to the United States Constitution requires that there be a conviction by a jury that is unanimous as to the defendant's specific illegal action," citing Beros, supra); State v. Flynn, 14 Conn.App. 10, 539 A.2d 1005, cert. denied 109 S.Ct. 226 (1988) (Connecticut has adopted "holding and rationale" of Gipson) State v. Johnson, 46 Ohio St.3d 96, 545 N.E.2d 636 (1989), cert. denied 110 S.Ct. 1504 (1990) (quoting Gipson approvingly); and People v. Olsson, 56 Mich.App. 500, 224 N.W.2d 691 (1974) (defendant could not be convicted of first degree murder when alternative theories of premeditated murder and felony murder were presented to the jury and it was unclear whether jury agreed unanimously to either theory)[8].

Requiring juror unanimity on a single theory of first degree murder is necessary to effectuate the reasonable doubt standard enunciated by this Court in In re Winship, supra. It begs the question to say that premeditated and felony murder are merely

[8]But see People v. Fullwood, 51 Mich.App. 46, 215 N.W.2d 594 (1974), reh. den. 393 Mich. 785 (1975). As one commentator noted, these decisions cannot be reconciled. Trubitt, Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues, 36 OKLA.L.REV. 473, 551-552 (1983)

different methods of performing the same act. There are significant differences between an intentional murder and a murder that occurs during the commission of another felony. Indeed, the only common element of the two crimes is that someone died. Without juror agreement as to what specific acts a defendant performed, the reasonable doubt standard is emasculated.

In noncapital cases, this Court has held that although the Sixth Amendment requires a unanimous verdict in federal criminal trials, it does not in state criminal trials. Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972). In reaching this conclusion, this Court specifically pointed out that in both Louisiana and Oregon, a defendant in a capital case would be entitled to a unanimous verdict. Johnson, 406 U.S. at 357, n.1 and Apodaca, 406 U.S. at 406, n.1.

This Court has never held that a less than unanimous verdict is constitutional in a capital case. Rather, it has held that capital cases require a heightened degree of reliability in the verdict. See, e.g. Beck v. Alabama, 447 U.S. 625, 638 (1980). Jury unanimity is essential to the heightened degree of reliability required in capital cases.

Moreover, unlike the state law on which this Court based its decisions in Johnson and Apodaca, Arizona law requires a unanimous jury verdict in all criminal cases. Ariz. Const. art. 2, Section 23 ("[i]n all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict."). Because Arizona has chosen to make jury unanimity a state constitutional right, it must

administer that right consistent with due process of law. Evitts v. Lucey, 469 U.S. 387 (1985) (when a state provides a right, it must administer that right in accord with due process). Arizona has failed to do so here. By authorizing a less than unanimous jury verdict in a first degree murder case charging alternatively premeditated and felony murder, Arizona provides less protection for the potential capital defendant than is afforded a defendant charged with the far less serious crime of negligent homicide. See A.R.S. Section 13-1102. This Court should grant certiorari to review the erroneous decision by the Arizona Supreme Court on this substantial and unsettled constitutional question. See, e.g. Williams v. Kaiser, 323 U.S. 471, (1945).

B. THE PETITIONER'S CONVICTION CANNOT STAND BECAUSE IT ALLOWS FOR A LESS THAN MAJORITY VOTE TO DECIDE GUILT OR INNOCENCE IN A CAPITAL CASE.

The Arizona Supreme Court's opinion in the Petitioner's case clearly permits a criminal defendant to be convicted when only six of the jurors agree as to what specific acts the defendant committed. The court's opinion in Arnett, supra, allows for conviction when only four jurors agree as to what specific acts the defendant committed. Given the various possibilities under A.R.S. Section 13-1105, supra, a defendant could be convicted of first degree murder in Arizona -- and sentenced to death -- when no more than two jurors agreed as to what specific acts the defendant

committed.[9]

Even if Johnson and Apodaca were applied to capital cases, the Arizona court decision here cannot stand. "While unanimity is not required, neither does it appear that a simple majority will satisfy the (S)ixth and (F)ourteenth (A)mendments. Especially when serious crimes are being tried ... it appears that a 'substantial majority' of the jury must vote to convict for a conviction to be obtained." United States Ex Rel Williams v. DeRoberts, 538 F.Supp 899 (N.D. Ill. 1982), rev'd on other grounds, 715 F.2d 1174 (7th Cir. 1984), cert. denied, 464 U.S. 1072 (1984) (reviewing a state conviction on habeas corpus) (citations omitted) (emphasis added). See Burch v. Louisiana, 441 U.S. 130 (1979); and Brown v. Louisiana, 447 U.S. 323, 331 (1980) ("(T)here do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial is to be maintained.") Johnson approved a 9-3 verdict,

[9]Indeed, it unfortunately requires little imagination to hypothesize a case where the state charges both premeditated and felony murder and argues that the defendant kidnapped, robbed, and committed a sexual assault on the victim in the course of causing the death of the victim. Under this scenario, the defendant could be convicted of first degree murder with three jurors believing the defendant killed the victim after premeditation, but nine jurors believing he did not; three of the jurors who did not believe the defendant committed a premeditated murder, believing that the defendant did commit a sexual assault on the victim, but did not either rob or kidnap the victim; three of the remaining six jurors who did not believe that the defendant committed a premeditated murder, believing that the defendant did commit a robbery on the victim, but did not either kidnap or commit a sexual assault on the victim; and the last three jurors believing that the defendant kidnapped the victim, but did not rob or sexually assault the victim. In Arizona, this defendant could be sentenced to death without anything approaching even a majority consensus of what he did and did not do.

but expressed no opinion as to a lesser majority. Justice Blackmun, concurring, expressly stated his view that a 7-5 verdict would not pass constitutional muster. Johnson, 406 U.S. at 366 (Blackmun, J., concurring).

In Petitioner's case, Arizona strayed much further from jury unanimity than Apodaca and Johnson allow. Unlike the nine-juror consensus in Johnson, the six person "consensus" on which Petitioner could have been convicted simply does not ensure the degree of verdict reliability that the Sixth Amendment demands. Little evidence was adduced against the Petitioner at trial. The prosecutor argued both theories of first degree murder. The trial court instructed the jury on both theories of first degree murder, but provided only one verdict form for the jury to return their judgment as to the charge. Under these circumstances, it is impossible to know whether every essential element of either premeditated murder or felony murder was proven against the Petitioner. In re Winship, supra, 397 U.S. at 361. Our criminal justice system has always required more than mere jury agreement that a defendant is an evildoer for a conviction to withstand constitutional scrutiny. See, e.g. Lanzetta v. New Jersey, 306 U.S. 451 (1939) (statute criminalizing being a "gangster" violates due process). The Arizona Supreme Court's decision in Petitioner's case does not realize this standard.

The Arizona Supreme Court, along with various other state courts, has defended this result simply by stating that criminal defendants are not entitled to unanimity of jury verdict as to

manner in which the crime was committed as legal fact. See e.g. State v. Wilson, 220 Kan. 341, 552 P.2d 931, 935-936 (1976) ("When an accused is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilt by reason of the killers malignant purpose."); State v. Ellison, 36 Wash.App. 564, 676 P.2d 531 (1984) (jury does not have to agree on theory as between premeditated and felony murder); Newsted v. State, 720 P.2d 734 (Okla.Crim.App.), cert. denied, 479 U.S. 995 (1986) (jury not required to choose unanimously between different theories of murder, citing Wilson, supra); State v. Tillman, 750 P.2d 546, 563 (Utah 1987) ("jurors in state court have ... to agree only on a defendant's guilt or innocence of the crime charged, not on a particular theory of that crime."); and People v. Adcox, 47 Cal.3d 207, 253 Cal.Rptr. 55, 763 P.2d 906 (1988), cert. denied, 110 S.Ct. 1500 (1990) (jurors not required to agree on theory as to first degree murder conviction). That assertion is not enough where it can result in a conviction based on a six-juror "consensus".

The two theories of Sixth Amendment jurisprudence exemplified by the groups of cases in the preceding paragraph and those following Gipson are obviously irreconcilable. Because of this obvious and direct conflict and because Arizona's holding on this issue in Petitioner's case violates the Sixth and Fourteenth Amendments, this Court should grant review and decide the issue.

II. THE MANDATE OF BECK V. ALABAMA CANNOT BE AVOIDED BY REFUSING TO ACKNOWLEDGE THE EXISTENCE OF A LESSER INCLUDED OFFENSE.

Under the Arizona definitions of robbery and felony murder, and the universally-accepted definition of a "lesser-included offense," robbery is a lesser-included offense of felony murder. On appeal to the Arizona Supreme Court, Petitioner argued that the trial court should have instructed the jury that it could find him guilty of robbery as a lesser-included offense of felony murder. Appendix "A" at 11. Such an instruction was required by the Eighth and Fourteenth Amendments. Beck v. Alabama, supra. The Arizona Supreme Court avoided this plain command of Beck by asserting, ipse dixit, that "in Arizona there is no lesser-included offense to felony murder." Appendix "A" at 12. (citations omitted). The issue raised is whether a State can render Beck v. Alabama meaningless simply by refusing to recognize the existence of lesser included offenses as a purported matter of state law.

Petitioner was convicted under the Arizona first degree murder statute, supra, pp. 4-5. In Petitioner's case, the underlying offense for the felony murder was robbery. Arizona defines robbery thus:

> A. A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

A.R.S. Section 13-1902. Theft, in turn, is a lesser-included offense of robbery under Arizona law. State v. Celaya, 135 Ariz. 248, 251-52, 660 P.2d 849, 852-53 (1983). The elements of theft

include the taking of another's property and specific intent to deprive the other of such property, but not the use or threat of force. Id., citing A.R.S. Section 13-1802. Under Arizona criminal procedure, a robbery instruction necessarily would have been accompanied by a theft instruction, provided that the evidence otherwise would have supported the giving of the instruction. Id. at 852, citing Rule 23.3, Rules of Criminal Procedure, 17 A.R.S.

In Petitioner's case, the Arizona Supreme Court acknowledged that "the evidence supported an instruction and conviction for robbery." Appendix "A" at 12. It bears repeating that the only substantial evidence against Petitioner in this case was his possession of the decedent's property. This evidence did not implicate Petitioner directly in the homicide. Petitioner could have found Mr. Graves' car and credit cards by the side of the road, and helped himself. This would have made Petitioner guilty of robbery if Mr. Graves was present, or theft if the car was unattended, but not homicide. Indeed, Petitioner's counsel argued to the jury that the evidence at most established that Petitioner had stolen Mr. Graves' property. See Appendix "H". But the jury had no option of convicting Petitioner of theft. Their only options were to convict the Petitioner of first degree murder or to find him not guilty.

Since the evidence here would have supported a verdict of robbery or theft, the remaining question under Beck v. Alabama is whether robbery is a lesser-included offense of felony murder in Arizona. If so, Beck required jury instructions that would have

permitted the jury to consider a verdict of guilt of the lesser-included non-capital offenses. Beck, 447 U.S. at 627.

The Court's analysis in Beck began with the common-law rule that a jury may find the defendant guilty of any lesser offense necessarily included in the offense charged. Beck, 447 U.S. at 633. The rule developed as an aid to the prosecution in cases where the prosecution could prove some, but not all, of the elements of the charged offense. See id., citing 2 C. Wright, Federal Practice and Procedure Section 515, n.54 (1969). An offense is lesser-included if it is impossible to commit the greater without also having committed the lesser. See 3 C. Wright, Federal Practice and Procedure Section 515. (2d ed. 1982). The Court held in Beck that Alabama's felony-murder crime was a lesser-included of that state's robbery-intentional killing crime, because the latter crime included all of the elements of the former plus for a culpable state of mind with respect to the killing. See, Beck, 447 U.S. at 627-28 and n.2.

The Court has applied the same view of lesser-included offenses in double jeopardy cases involving successive prosecutions. The Double Jeopardy Clause prohibits successive prosecutions for the "same" offense. Brown v. Ohio, 431 U.S. 161 (1977). In Brown, the Court decided that two crimes are the "same" if the lesser requires no proof different from that which is required for a conviction of the greater. Id. at 168. "The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Id.

Then, in Harris v. Oklahoma, 433 U.S. 682 (1977), the Court held that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." Id. at 683 (footnote and citations omitted). In other words, Harris held that the murder conviction barred the later prosecution for robbery with firearms because robbery was a lesser-included offense of murder.

Under the foregoing principles, developed in the common-law and applied by this Court in Beck and elsewhere, robbery is a lesser-included offense of felony murder in Arizona. Where (as in Petitioner's case) the felony murder charge is based on an underlying felony of robbery, it is by definition impossible to commit felony murder without also having committed robbery. The elements of felony murder are by definition the same as the elements of robbery, with the additional element of causing the death of another person in the course of the robbery. See A.R.S. Section 13-1105.

The Arizona Supreme Court's contrary rule, that neither robbery nor any other crime is a lesser-included offense of felony murder, has never been satisfactorily explained. In some cases the Arizona court has said that the specific intent required for the underlying felony in a relony murder case supplies the mens rea necessary to satisfy the premeditation element of first degree murder. See, e.g. State v. LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). This does not explain why the underlying felony is not a

lesser-included offense where the parties dispute whether the defendant caused a death in the course of the felony. In another case the Arizona court stated the "no lessers" rule and cited United States v. Garrett, 471 U.S. 773 (1985). State v. Leslie, 147 Ariz. 38, 48, 708 P.2d 719, 729 (1985). But Garrett, which held that drug importation and "continuing criminal enterprise" are not the same crime for double jeopardy purposes, lends no apparent support to the court's position either.

Arizona's treatment of the Beck rule eviscerates it. To avoid Beck, a state need only to deny the existence of lesser-included offenses. The Ninth Circuit has upheld this approach, rejecting a Beck claim with a bare reference to Arizona's "no lessers" rule. Woratzeck v. Ricketts, 820 F.2d 1450 (9th Cir. 1987), vacated on other grounds, 486 U.S. 1051 (1988). At least one state high court, on the other hand, has recognized that the state cannot invoke state law to avoid giving an lesser-included instruction that Beck would otherwise require. See Hook v. State, 315 Md. 25, 555 A.2d 233 (1989) (prosecutor prohibited from entering a nolle prosequi on second degree murder in the middle of the trial, over the defendant's objection).[10]

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[10]Spaziano v. Florida, 468 U.S. 447 (1984) supports the analysis in Hook, and also Petitioner's position here. The Court held in Spaziano that the defendant was not entitled to the benefit of both a lesser-included offense instruction and an expired period of limitations on the lesser offenses. Id. at 454. Seven members of the Court agreed that the Constitution required the state to give the defendant the option of waiving the state-law statute of limitations, so that the jury could be instructed on the lesser-included offenses. See id. at 456-57; id. at 490 (Stevens, J., concurring in part and dissenting in part); id. at 467 (White, J., concurring in part and concurring in the judgment). Moreover, even

To prevent the demise of Beck v. Alabama, the Court must grant this petition for writ of certiorari and reverse the judgment of the Arizona Supreme Court.

CONCLUSION

The Arizona Supreme Court's holding that the Petitioner may be convicted and sentenced to death without a unanimous, or even majority, vote as to what specific acts he committed conflicts directly with the rules in other state and federal jurisdictions and violates the Petitioner's rights under the Sixth and Fourteenth Amendments. The Arizona Supreme Court's holding that the Petitioner was not entitled to have the jury consider whether he committed the lesser offenses of robbery or theft violates the Petitioner's Eighth and Fourteenth Amendment rights and this Court's holding in Beck v. Alabama. The writ of certiorari should, therefore, be granted.

Respectfully submitted,

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August 16, 1990

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if Spaziano had allowed the state to enforce its statute of limitations to avoid lesser-included offenses, it would be quite another thing to allow a state to achieve the same result by redefining the very concept of a lesser-included offense.

FILED
DEC 14 1989
SUPREME COURT

IN THE SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, v. EDWARD HAROLD SCHAD, JR., Appellant.	Supreme Court No. 4876-3 Yavapai County Superior Court No. 8752 O P I N I O N 12-18-89

Appeal from the Superior Court of Yavapai County

The Honorable Richard Anderson, Judge

AFFIRMED

Robert K. Corbin, Attorney General
by Jessica Funkhouser, Chief Counsel
Criminal Division
R. Wayne Ford, Assistant Attorney General
Attorneys for Appellee — Phoenix

S. Alan Cook, P.C.
by S. Alan Cook
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HOLOHAN, Justice (Retired)

The defendant, Edward Harold Schad, Jr., was convicted by a Yavapai County jury of first degree murder and sentenced to death. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983, 102 S. Ct. 1492, 71 L. Ed. 2d 693 (1982). On the defendant's petition for post-conviction relief, this

court reversed the conviction, holding that the trial court committed fundamental error by instructing the jury on felony murder without defining the elements of the underlying felony. State v. Schad, 142 Ariz. 619, 691 P.2d 710 (1984). On remand, the defendant was again convicted of first degree murder and sentenced to death. This appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4031.

The facts of this case are fully set forth in our 1981 opinion, supra. Briefly summarized, the following facts led to the defendant's conviction in the second trial.

The victim, Lorimer "Leroy" Grove, was last seen alive on August 1, 1978, when he left Bisbee, Arizona for Everett, Washington in his new Cadillac. His body was discovered August 9, 1978, off the highway just south of Prescott. The corpse was not identified until October 11, 1978, after the defendant's arrest. The killer had strangled the victim to death with a small rope tied around his neck.

The defendant's connection with the homicide is established only by circumstantial evidence. Beginning with the day after the victim left Bisbee, the defendant made numerous purchases with the victim's credit cards. The police recovered credit cards from the defendant's wallet after his arrest. The state also introduced a forged check drawn on the victim's bank account and made to the defendant's order for "wages." A car the defendant had rented, but never returned, was discovered in

Flagstaff in early August, 1978. Discovered in this car was a "unique mirror contraption" designed and built by the victim. On September 3, 1978, New York authorities issued the defendant a speeding ticket for an offense he committed while driving the victim's Cadillac. The defendant explained to the citing officer that the car belonged to his friend Leroy Grove. Later in September, the defendant drove the Cadillac to Salt Lake City, Utah. While he was in Utah, the Salt Lake City police arrested the defendant for investigation of a possible parole violation and possession of a stolen vehicle. During his incarceration in the Salt Lake City jail, the defendant spoke with John Duncan[1] and made several inculpatory statements. Thereafter, a Yavapai County Grand Jury indicted the defendant for the murder of Lorimer Grove and the authorities extradited the defendant to Arizona to stand trial.

The defendant raises the following issues for our consideration:

> 1. Did admitting statements that the defendant made to John Duncan in the Salt Lake City jail violate the defendant's constitutional rights?
>
> 2. Was the defendant denied a fair trial when the state failed to preserve the victim's clothing and preserve fingerprint impressions on items found with the body and on the mirror contraption?
>
> 3. Did the trial court commit error by failing to instruct the jury on, and provide a form of verdict for, the lesser-included offense of robbery?

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[1] Duncan had been staying with the defendant's girlfriend when the defendant arrived in Salt Lake City.

4. Did the trial court err when it refused to give forms of verdict for both premeditated murder and felony murder?

5. Was it proper to use the defendant's prior murder conviction as an aggravating factor?

6. Were the defendant's double jeopardy rights violated when two aggravating factors were found based on a single prior conviction?

7. Were the defendant's rights violated when the trial court found that the the defendant committed the murder for pecuniary gain?

8. Did the court fail to properly weigh the mitigating circumstances?

9. Did the defendant's "inability" to "voir dire" the trial judge deprive him of a fair trial?

10. Is Arizona's statutory death sentencing scheme unconstitutional?

In addition to addressing the issues raised by the defendant, we independently review the aggravating and mitigating circumstances found by the trial judge, determine whether the defendant's sentence is proportional to similar cases, and search the record for fundamental error.

THE STATEMENTS

At the defendant's second trial, as in the first trial, the court permitted the state to present testimony by John Duncan concerning statements the defendant made to him when he visited the defendant in the Salt Lake City jail. The defendant's most incriminating statement was that he would "deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona."

This court reviewed the circumstances surrounding Duncan's testimony in our 1981 opinion in light of Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). Schad, 129 Ariz. at 565, 633 P.2d at 374. We found that Duncan and the Utah authorities had no agency relationship, that the police did not actively or deliberately solicit Duncan's assistance and that the evidence obtained was insignificant. Therefore, we concluded that the trial court properly denied the defendant's motion to suppress the statement. Schad, 129 Ariz. at 566, 633 P.2d at 375. Nevertheless, the defendant's counsel again moved to suppress the statements prior to the second trial because new evidence allegedly justified a rehearing and established grounds for suppressing the testimony at the new trial. This new evidence consisted of:

1. Testimony from Sergeant Judd of the Coconino County Sheriff's office that Detective Halterman described Duncan as an "informant" and a "confidential informant."

2. Testimony that Detective Halterman had asked Duncan if he would be willing to visit the defendant in jail and arranged the visit for a Monday. Monday was not a normal visiting day, so Duncan could not have made the visit without special arrangements.

3. Detective Halterman arranged for Duncan's release pending extradition.

Despite this "new evidence," the trial court again denied the defendant's motion to suppress. The judge concluded

that the use of the word "informant" by Detective Halterman was a matter of semantics rather than of substance. In his ruling the judge stated:

> The Halterman testimony was rather clear, was extremely clear and unequivocal relative to the witness Duncan's not being, term of art, a confidential informant. The way we come up with the language confidential information and informant in this particular case is from Lieutenant Judd from his police report ... but of course as you know, Lieutenant Judd had no facts upon which to base a conclusion that ... Mr. Duncan might be what we have come to know as the confidential informant.

R.T. Vol. VI, p. 815.

Halterman denied suggesting a visit with the defendant. In fact, Duncan testified it was his idea. R.T. Vol. VI, pp. 672 and 809. The record is less clear on who arranged the visit. Duncan stated that he thought that Detective Halterman or someone from the police department arranged his visit. Id. at 804. Nevertheless, the evidence established that the police did not tell Duncan to visit Schad or what questions he should ask. Furthermore, the homicide investigation had yet to focus on Schad because Detective Halterman did not learn that the owner of the Cadillac was dead until a month after Duncan's visit. Id. at 666, 803. Finally, Duncan's release pending extradition was arranged prior to the Schad case coming to light for reasons separate and apart from Duncan's subsequent assistance in this case.

It is unnecessary to review the relevant case law. We

do not find the defendant's evidence any more compelling than the last time. The record supports the judge's ruling. We find no error in denying the defendant's motion to suppress.

PRESERVATION OF EVIDENCE

The state did not (1) preserve the victim's clothing; (2) fingerprint items found with the body; or (3) fingerprint the mirror device found in the defendant's abandoned rental car. The trial court did give a Willits instruction.[2] State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964). Despite this instruction, the defendant argues that the state's failure to process these items, especially the mirror, deprived the defendant of exculpatory evidence in violation of his due process right to a fair trial. The defendant contends that had these items been processed, he could have proved that someone else committed the crime.

The state counters that the defendant is barred from relief because he failed to raise this issue at the first trial. The only case cited by the state is inapposite because it concerns waiver of issues by failure to object at trial. Although the defendant did not raise this issue until the second trial, we find that his pretrial motions properly preserved this issue for

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[2] The jury was instructed:

> If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed or allowed to be destroyed any evidence whose contents or quality is in issue, you may infer that the true fact is against their interest.

review.

The "substantive" issue raised is whether the state had a duty to preserve the victim's clothing,[3] and to collect and process fingerprints from the mirror and other objects. The defendant argues that the state's failure to collect and preserve potentially exculpatory evidence requires reversal of the conviction and dismissal of the charges. See California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. 1984).

In Trombetta, the U.S. Supreme Court held that the due process clause of the 14th Amendment does not require the state to preserve breath samples in order to introduce the results of breath-analysis tests at a DUI trial. 467 U.S. at 491, 104 S. Ct. at 2535, 81 L. Ed. 2d at 423. Under the Federal Constitution, the state's duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." Id. at 488, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. This materiality test requires that the evidence (1) possess an exculpatory value that was apparent before the evidence was destroyed and (2) be such that the defendant would be unable to obtain comparable evidence by other reasonable means. Id. at 489, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. The

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[3] It should be noted that the state's expert testified that the victim's clothes were forensically useless due to the advanced state of decomposition.

Court concluded that "the chances are extremely low that preserved [breath] samples would have been exculpatory." Id.

Recently, we held that a Willits instruction adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced or the state acted in bad faith. State v. Tucker, 157 Ariz. 433, 442-43, 759 P.2d 579, 588-89 (1988). Tucker held that the partial latent fingerprints destroyed by the state "had some forensic value in excluding the defendant from having left the prints," but "could not have excluded Tucker from having handled the gun, and certainly could not have excluded him from committing the crime." Id. at 442, 759 P.2d at 588. Thus, we concluded that a Willits instruction adequately protected the defendant's rights. Cf. State v. Hannah, 120 Ariz. 1, 583 P.2d 888 (1978) (where the only items connecting the defendant to the crime were destroyed, we found that the defendant had been so seriously prejudiced by the loss of the evidence that he could not receive a fair trial).

The state concedes that any recoverable fingerprints which may have existed were probably destroyed in the defendant's first trial. The state urges us to consider that the defendant had ample opportunity to analyze the mirror before the prints were destroyed and that defense counsel participated in their destruction. It may well be that the defendant's counsel participated in the destruction of evidence. However, the duty to

preserve evidence remains with the state and nothing in the record shows the defendant or his counsel solely responsible or more culpable than the state for the loss.

Nevertheless, we find that the Willits instruction adequately protected the defendant's rights. Unlike Hannah, the mirror was not the only piece of evidence linking the defendant with the crime. The defendant was arrested in possession of the victim's credit cards and car. He told the New York patrolman that he was driving the car for the victim. Furthermore, as we found in Tucker, a Willits instruction adequately addressed the loss of the fingerprint evidence.

> The best possible scenario for Tucker is that an examination of the partial latent prints would have excluded him from the set of persons whose prints were on the gun. However, as stated above, such an exclusion would not have excluded Tucker from ever having handled the gun and certainly would not exonerate Tucker of the alleged crime. As Tucker's expert explained, Tucker could have touched the gun, but not left a print, or the print could have been easily wiped off either intentionally or unintentionally through subsequent handling. We find no reasonable possibility that defendant was prejudiced by the destruction of the partial latent prints. [Citations omitted.]
>
> Moreover, under the Willits instruction, the jury could infer exactly what the destroyed evidence, at best, could have proved--that Tucker's prints were not on the gun. Under these circumstances, where the destroyed evidence would not exonerate Tucker, and where the Willits instruction provided the same benefit as any independent examination of the evidence, the Willits instruction protected Tucker's right to a fair trial.

Tucker, 157 Ariz. at 443, 759 P.2d at 589.

Similarly, in the present case, the best that the defendant could hope for is that none of his fingerprints were on the mirror, clothing or other items. While this would have excluded the defendant from the set of persons whose prints were on these items, it would not have excluded the defendant from ever having handled any of these objects, nor would it have exonerated him of the alleged crime. The Willits instruction accomplished the most that the defendant could have proved--that his prints were not on these items. We find that the defendant's rights were adequately protected.

FAILURE TO GIVE ROBBERY INSTRUCTION OR FORM OF VERDICT

Here the defendant contests the trial court's failure to give a lesser included offense instruction or to provide a form of verdict for robbery. Defendant argues that Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), requires a robbery instruction and form of verdict because: (1) the evidence supported a conviction for the offense of robbery; and (2) the robbery is a lesser-included offense of the felony murder because it was the underlying felony.

Although the defendant concedes that he did not request such an instruction or verdict form, he argues that it was fundamental error. He also maintains that counsel ineffectively assisted him in failing to request such instructions. In an Arizona capital case, the trial court must instruct on all lesser-included offenses supported by the evidence. Failure to

do so, with or without a request, constitutes fundamental error. State v. Whittle, 156 Ariz. 405, 407, 752 P.2d 494, 496 (1988). However, in Arizona there is no lesser-included offense to felony murder. State v. LaGrand, 153 Ariz. 21, 30, 734 P.2d 563, 572, cert. denied, 484 U.S. 872, 108 S. Ct. 207, 98 L. Ed. 2d 158 (1987); see also State v. Leslie, 147 Ariz. 38, 48, 708 P.2d 719, 729 (1985); State v. Martinez-Villareal, 145 Ariz. 441, 446-47, 702 P.2d 670, 675-76, cert. denied, 474 U.S. 975, 106 S. Ct. 339, 88 L. Ed. 2d 324 (1985). Although we agree with the defendant that the evidence supported an instruction and conviction for robbery, we disagree that the underlying felony supporting a felony murder conviction requires a lesser-included offense instruction and form of verdict. LaGrand, 153 Ariz. at 30, 734 P.2d at 572. His attorney's failure to request one was not ineffective assistance of counsel.

SINGLE VERDICT FORM FOR FIRST DEGREE MURDER

The defendant next argues that the trial court erred when it submitted to the jury one verdict form for the crime of first-degree murder while instructing them that the crime could be committed in either of two ways--by premeditation or by the commission of a felony. The defendant's arguments on this issue have all been previously decided by this Court and rejected. In State v. Encinas, 132 Ariz. 493, 647 P.2d 624 (1982), we stated:

> In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. See State v. Axley, 132 Ariz. 383, 646 P.2d 268 (1982). Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, State v. Counterman, 8 Ariz. App. 526, 448 P.2d 96 (1968), the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

Id. at 496, 647 P.2d at 627.

Our decision in State v. Smith, ___ Ariz. ___, 774 P.2d 811 (1989), did not change the substantive rule that it was not error to have one form of verdict for first degree murder even though both premeditation and felony murder were being submitted to the jury. Smith does, however, strongly urge that alternate forms of verdict be submitted to a jury when a case is submitted on alternative theories of premeditated and felony murder. Id. at ___, 774 P.2d at 811.

SENTENCE

In the special verdict on the sentence, the trial court found the existence of three statutory aggravating circumstances: previous conviction of an offense for which a sentence of life imprisonment was possible, previous conviction for a crime involving violence, and commission of the murder for pecuniary gain. The trial court found several mitigating factors, but concluded that they were not sufficiently substantial to call for leniency. The trial court specifically found that the total mitigation was not sufficient to overcome any one of the aggravating circumstances. R.T. August 29, 1985, p. 10. As a result of the court's findings, the defendant was sentenced to death.

THE PRIOR CONVICTION

The defendant's 1968 conviction in the State of Utah for second degree murder was found by the trial court to constitute two aggravating circumstances set out in former A.R.S. § 13-454(E)(1) and (E)(2) (now A.R.S. § 13-703(F)(1) and (F)(2)).[4] The defendant attacks the trial court's use of these factors to enhance the penalty to death because: (1) society no longer recognizes sodomy as a felony; (2) there is no crime of felony second-degree murder in Arizona; (3) the present Arizona sodomy statute is unconstitutional; (4) former § 13-454(E)(2) (now § 13-703(F)(2)) is not applicable because the Utah offense did not involve violence; and, (5) the Utah conviction is invalid in light of Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

The defendant's conviction of second degree murder occurred in connection with mutual acts of sodomy. The victim

[4]The current version of the statute provides in relevant part:

> F. Aggravating circumstances to be considered shall be the following:
>
> 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

was found in a closet with his hands and feet bound and two pieces of cloth around his neck. Apparently, the cloth was tied around the victim's neck for the purpose of restricting the flow of blood to the brain in order to heighten erotic stimulus--a practice known as auto-erotic asphyxiation. In 1968 sodomy was a felony in both Utah and Arizona.[5]

The main thrust of the defendant's argument is that the changes in the criminal code, reducing the punishment for sodomy to a misdemeanor and the elimination of the offense of second degree felony murder, require that the defendant's Utah conviction not be considered an aggravating circumstance for sentencing. The defendant's argument seeks not only to have us ignore the requirement that we consider the penalty imposable at the time of the conviction, but it mischaracterizes the nature of the defendant's Utah conviction.

In considering a prior offense for sentencing purposes, a court looks at the penalty in effect under Arizona law at the time the defendant was sentenced for the prior offense, not the penalty for the prior offense at the time of sentencing for a subsequent conviction. State v. Tittle, 147 Ariz. 339, 710 P.2d 449 (1985). The defendant concedes that pursuant to former A.R.S. §§ 13-453(B) and -1644, the maximum penalty for second-degree murder in 1968 was life imprisonment. See State v.

[5] The current Arizona statute, in effect since 1978, provides that sodomy is a misdemeanor. A.R.S. § 13-1411.

Williams, 103 Ariz. 284, 440 P.2d 311 (1968). However, the defendant contends that aggravating his sentence under these circumstances would violate his constitutional rights.

Contrary to the contention implicit in defendant's argument, the prior conviction in Utah was not merely for committing sodomy. The defendant was found guilty of committing a dangerous act while engaging in sodomy. The Utah Supreme Court specifically found that sodomy performed while engaging in auto-erotic asphyxiation constituted a dangerous felony. See State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970).

> It is so obvious as not to require elucidation that the act of sodomy committed in the manner shown here, with the deceased so bound that he choked to death, was an act "greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life."

Id. at 261, 470 P.2d at 250 (emphasis added).

The defendant's second degree murder conviction in Utah was not based on the mere act of sodomy but the manner in which it was performed. Schad, 24 Utah 2d at 261, 470 P.2d at 250. Irrespective of the debate concerning the constitutionality of statutes prohibiting consensual sodomy,[6] it is clear that a state may lawfully punish a person for engaging in conduct exhibiting a knowing or reckless disregard for human life. See A.R.S.

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6 Both the United States Supreme Court and this court have held that a state may lawfully prohibit consensual sodomy. Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); State v. Bateman, 113 Ariz. 107, 547 P.2d 6, cert. denied, 429 U.S. 864, 97 S. Ct. 170, 50 L. Ed. 2d 143 (1976).

§§ 13-1103(A)(1), -1104(A)(3). This is the crux of the defendant's Utah conviction. Under similar circumstances the defendant's conduct would have constituted second degree murder in Arizona.

CONVICTION FOR FELONY INVOLVING VIOLENCE

The defendant argues that his previous conviction for second degree murder did not involve "violence" within the meaning of A.R.S. § 13-703(F)(2). He argues that the death was an "accident" involving no physical force because he and the victim were consenting homosexual partners. To support this argument, the defendant points to the medical examiner's reports, admitted at the Utah sentencing, stating that the victim had likely tied himself up to heighten his pleasure.

The state argues that murder is inherently a violent crime, and cannot occur absent some type of violence to the victim. Tittle, 147 Ariz. at 345, 710 P.2d at 455 (robbery is inherently violent, and so satisfies § 13-703(F)(2)).

It is not necessary for us to resolve this issue, because the trial judge, in his special findings, found that the total mitigation present was "not sufficient to overcome any one of the aggravating circumstances." Transcript of Sentencing, August 29, 1985, p. 10. Any one of the other aggravating factors would be sufficient to support the sentence.

TWO AGGRAVATING FACTORS ARISING FROM SINGLE PRIOR CONVICTION

The defendant claims that the use of a single prior conviction as the basis for two aggravating factors violates his

double jeopardy rights. Therefore, he argues, we should strike at least one of the aggravating factors.

So long as the trial court weighed the aggravating circumstances arising out of the 1968 murder only once, the defendant's rights have not been infringed. Tittle, 147 Ariz. at 345, 710 P.2d at 455. Here the trial judge found that the totality of the mitigating circumstances was insufficient to overcome even a single aggravating factor. Hence, it did not matter that the trial court found two aggravating factors arising from his prior conviction since one was enough to impose the death penalty.

FINDING THAT MURDER WAS COMMITTED FOR PECUNIARY GAIN

The defendant claims that the trial court violated his rights when it found that he murdered for pecuniary gain. Former A.R.S. § 13-454(E)(5) (now A.R.S. § 13-703(F)(5)). The defendant contends that the pecuniary gain aggravating factor (1) is unconstitutionally vague, (2) was unconstitutionally applied ex post facto, (3) violates double jeopardy, and (4) was not proved beyond a reasonable doubt.

A. Vagueness

The defendant argues that the pecuniary gain factor is vague because it fails to distinguish between a killer for hire and a "routine" felony (e.g. burglary or robbery) where a death occurs. Therefore, a person of average intelligence will not understand that his act is a capital crime. See State v. Bate-

man, 113 Ariz. 107, 109, 547 P.2d 6, 8, cert. denied, 429 U.S. 864, 97 S. Ct. 170, 50 L. Ed. 2d 32 (1976). We have rejected this contention in an earlier case and find no reason to hold otherwise. State v. Nash, 143 Ariz. 392, 400, 694 P.2d 222, 230, cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed. 2d 706 (1985).

B. Ex Post Facto

In 1980, this court held for the first time that the pecuniary gain aggravating factor was not limited to contract killers. State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980). The defendant argues that application of Clark to him constitutes ex post facto enlargement of the penalty for murder motivated by pecuniary gain when his offense occurred before the Clark decision.

A judicial decision is not subject to the constitutional bar against ex post facto legislation. United States v. Walsh, 770 F.2d 1490, 1492 (9th Cir. 1985). However, a defendant's due process rights are violated when an unforeseeable judicial decision enlarging the scope of a criminal statute is applied retroactively to cover behavior not considered unlawful in the past. Bouie v. City of Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, 1702-03, 12 L. Ed. 2d 894, 899-900 (1964).

In the present case, the defendant misinterprets Clark. That opinion did not hold that former A.R.S. § 13-454(E)(5)

excluded non-contract/hired-killer situations prior to Clark. Clark merely rejected the argument that the factor of pecuniary gain was restricted to "hired guns." The Clark opinion did not create substantive law, it merely recognized the pre-existing scope of present law. It was not an unforeseeable enlargement nor did it suddenly make lawful conduct unlawful. As in Clark, finding that the defendant committed this crime for pecuniary gain is not a violation of the defendant's due process rights.

C. Double Jeopardy

The defendant also claims violation of his right against double jeopardy. He reasons that use of a general verdict form prevents the court from ascertaining whether the conviction was based on a finding of premeditation or felony murder. The defendant speculates that if premeditation were the basis of the jury's conviction, then the double jeopardy clause would bar pecuniary gain as an aggravating factor since the jury must have "acquitted" him of robbery. Therefore, since it is impossible to determine which type of first degree murder defendant is guilty of, but only that he is guilty of first degree murder, the state failed to prove pecuniary gain beyond a reasonable doubt. State v. Richmond, 136 Ariz. 312, 322, 666 P.2d 57, 67, cert. denied, 464 U.S. 986, 104 S. Ct. 435, 78 L. Ed. 2d 367 (1983); A.R.S. § 13-703(C).

Whether the jury "acquitted" the defendant of robbery is irrelevant. The double jeopardy clause protects against a second

prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense. State v. Seats, 131 Ariz. 89, 638 P.2d 1335 (1981). Pecuniary gain is not the same offense as robbery. See A.R.S. § 13-1902. It is an aggravating factor for determining a defendant's sentence in a capital case. In State v. Carriger, 143 Ariz. 142, 161, 692 P.2d 991, 1010 (1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2347, 85 L. Ed. 2d 864 (1985), we stated:

> To prove robbery, the state must show a taking of property from the victim, see A.R.S. § 13-1902(A); to prove pecuniary gain, the state must show the actor's motivation was the expectation of pecuniary gain, see A.R.S. § 13-703(F)(5). Proving a taking in a robbery does not necessarily prove the motivation for a murder, and the state cannot be said to be using one fact to prove two different items.

(Emphasis in original.) Even if we were to assume that the jury specifically found that no robbery occurred, double jeopardy does not prevent the trial judge from finding that the defendant's motivation for killing the victim was the expectation of pecuniary gain.

D. Sufficiency of Evidence

The defendant finally contends that there was insufficient evidence to show the murder was committed for pecuniary gain. He claims that the only evidence suggesting he killed the victim for pecuniary gain was circumstantial and that the act may well have been an afterthought.

Prior to encountering the victim, the defendant was

driving a stolen car. He abandoned that car and took the victim's car. He also left the murder scene with the victim's wallet, money, credit cards and ring. This provides strong circumstantial evidence that the purpose of the murder was pecuniary gain. Clark, 126 Ariz. at 436, 616 P.2d at 896. The evidence strongly supports the finding by the trial judge that the aggravating circumstance of pecuniary gain existed in this case.

MITIGATING FACTORS

The defendant next argues that the trial court erred by failing to consider the defendant's potential for rehabilitation and the circumstances of the Utah murder. A.R.S. § 13-703(E) requires that the trial court "take into account the . . . mitigating circumstances" and then determine whether those circumstances are "sufficiently substantial to call for leniency." Mitigating circumstances include "any factors . . . which are relevant in determining whether to impose a sentence less than death. . . ." A.R.S. § 13-703(G).

Contrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors. We also reject the defendant's claim that the circumstances surrounding his prior murder conviction should be considered as a mitigating circumstance because the victim experienced "a pleasurable erotic

experience" before he died. While it is clear that the Utah murder did not display the depravity present in the case at bar, the trial court did not find the circumstances of the earlier murder to be mitigating and neither do we.

As is required at this point, we conduct our own independent examination of the record to determine whether the death penalty is properly imposed. State v. Vickers, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981). We note, however, that in 1981 we considered and affirmed the defendant's death penalty. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983, 102 S. Ct. 1492, 71 L. Ed. 2d 693 (1982).

Our review of the record satisfies us that the state proved that the defendant committed the murder for pecuniary gain. The state also properly established an additional aggravating circumstance arising out of the defendant's prior murder conviction. Thus, we find, without question, that there were at least two aggravating circumstances in the present case.

We also conclude that the mitigating circumstances are insufficient to outweigh a single aggravating factor. Although the defendant has continued to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to call for leniency. The evidence shows that the defendant strangled to death a 74-year-old man in order to obtain his vehicle and money. At the time the defendant committed this act, he had previously been found criminally responsible for another

person's death. The death penalty is appropriate in this case.

VOIR DIRE EXAMINATION OF TRIAL JUDGE

The defendant next contends that lack of an opportunity to examine the trial/sentencing judge for bias and/or prejudice in a capital case violated his rights to due process and a fair trial. The defendant argues that voir dire examination of potential jurors is a constitutional requirement of a fair trial and should similarly apply in a capital sentencing case where the trial judge sits as a fact-finder.

We recently addressed this issue in State v. Fulminante, 11 Ariz. Adv. Rep. 7 (June 16, 1988), reconsideration granted on other grounds, 38 Ariz. Adv. Rep. 16 (July 11, 1989), and rejected the defendant's claim that he had a constitutional right to voir dire the trial judge. We have also previously held that a defendant must raise this issue at trial or it will be waived. State v. Rossi, 146 Ariz. 359, 369, 706 P.2d 371, 381 (1985). Here the the defendant failed to request voir dire of the trial court, and never expressly or impliedly alleged bias or prejudice. Therefore, he waived this issue.

CONSTITUTIONAL CHALLENGES[7]

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[7] We are aware of the decision of the United States Court of Appeals for the Ninth Circuit in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), petition for cert. filed, Mar. 20, 1989, which holds that Arizona's death penalty statute is unconstitutional. The Ninth Circuit opinion invalidates our death penalty scheme on some of the same grounds the defendant raises here. We note that the grounds on which the Ninth Circuit rested its
(Footnote continued)

The defendant raises several arguments that the Arizona death penalty is unconstitutional. The defendant first argues that the statutory scheme for capital punishment is unconstitutionally vague because it fails to provide adequate standards for weighing aggravating and mitigating standards. We have previously considered this argument, and we reject it again. Rossi, 146 Ariz. at 366, 706 P.2d at 378. The defendant next contends that Arizona's death penalty statute is mandatory and therefore unconstitutional. As we have done before, we reject this argument. Id. Finally, the defendant asks us to reconsider the Arizona death penalty on the following five grounds: (1) the death penalty is cruel and unusual punishment; (2) it denies the defendant a right to a jury trial on the issue of sentencing; (3) it allows the prosecutor arbitrary discretion to seek the death penalty; (4) it places the burden of proving mitigating circumstances on the defendant; (5) it is arbitrarily, capriciously and freakishly imposed. There is nothing in the defendant's case causing us to reconsider the death penalty on any of these grounds. We have rejected them before and adhere to that view. Id.

PROPORTIONALITY REVIEW

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[7] (continued)
constitutional holdings are grounds on which different courts may reasonably hold differing views of what the Constitution requires. Until the United States Supreme Court instructs us that our interpretations are incorrect, we will continue to apply them.

After considering the defendant's claims of error, we make an independent review to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. Richmond, 136 Ariz. at 321, 666 P.2d at 66. We compare the defendant and his crime to those cases where the death penalty was properly imposed because the crime was committed in a manner raising it above "the norm" of first degree murders, or the defendant's background places him above "the norm" of first degree murderers. State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982). We also compare the defendant and his crime to those cases where we have lessened the penalty imposed to life imprisonment. State v. McCall, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983), cert. denied, 467 U.S. 1220, 104 S. Ct. 2670, 81 L. Ed. 2d 375 (1984).

There are numerous instances where we have upheld the imposition of the death penalty when the murder was committed for pecuniary gain. State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066, cert. denied, 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984); State v. Blazak, 131 Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982); State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982). We have also upheld the death penalty in cases where the defendant had prior

convictions punishable by life imprisonment. State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988); State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986); State v. Bracy, 145 Ariz. 520, 703 P.2d 464 (1985), cert. denied, 474 U.S. 1110, 106 S. Ct. 898, 88 L. Ed. 2d 932 (1986); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984).

In contrast, we have reduced a defendant's death penalty sentence to life imprisonment where we have found insufficient evidence to support the aggravating circumstances. State v. Johnson, 147 Ariz. 395, 710 P.2d 1050 (1985). We have also reduced the defendant's sentence where the defendant was mentally impaired, State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983), or very young when he committed the crime. State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982).

Nothing in the present case leads us to consider that death is a disproportionate punishment. The defendant does not fall within any of the cases where we have reduced the death penalty to life imprisonment. We find nothing in the record otherwise making his sentence disproportionate. The defendant does, however, fall within those cases where the death sentence was properly imposed. Thus, the imposition of the death penalty is justified.

We have examined the record for fundamental error and find none. We affirm the judgment of conviction and the sentence.

William F. Holohan, Justice,
Retired

CONCURRING:

Frank X. Gordon, Jr., Chief
Justice

Stanley G. Feldman, Vice
Chief Justice

James Duke Cameron, Justice

James Moeller, Justice

(59)

Supreme Court

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2888

TELEPHONE (602) 542-4536

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

April 18, 1990

RE: STATE OF ARIZONA vs. EDWARD HAROLD SCHAD, JR.
Supreme Court No. 4876-3 (CR-85-0246-AP)
Yavapai County No. 8752

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 17, 1990, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Justice Corcoran recused himself and did not participate in the determination of this matter.

Mandate to follow.

NOEL K. DESSAINT, Clerk

TO:
S. Alan Cook, Esq., S. Alan Cook, P.C.
Hon. Robert K. Corbin, Attorney General, ATTN: Jessica Gifford Funkhouser, Esq., and R. Wayne Ford, Esq.
Charles R. Hastings, Yavapai County Attorney
Edward Harold Schad, Jr., ASP, Post Office Box B-40496, Florence, AZ 85232
rs

the time. But this is a very serious case. And you do have an important obligation, an obligation that goes both ways, both to the defendant and to the State. And the State's interest in this case of course is to bring to justice the man who murdered Larry Grove.

I'm not going to make an emotional pitch, I don't think that's appropriate. You are here to make an objective decision, but don't lose sight of the fact this was a cold-blooded killing. You don't get much more cold-blooded than strangling the life out of a 74 year old man, a man you do not need to kill, and the motive as I told you in my opening statement at the beginning of this trial, the motive for this cold-blooded killing was greed, the car and money.

Justice needs to be done members of the jury, and on behalf of the people that I represent, the people of this community and of this state, I ask that you find Mr. Schad guilty of first degree murder.

[redacted] Ladies and gentlemen, I will now tell you the rules you must follow to decide this case. I will instruct you on the law. It is your duty to follow the law. I want to point out that I am going to give you one copy of these instructions to take into the jury room with you. So if you would give me your attention as I read them, you'll be able to refer to the instructions as you see fit in the jury room.

It is your duty to determine the facts. You must

determine the facts only from the evidence produced in court. You should not guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion you may feel that I have about the facts. You are the sole judges of the facts.

You must take into account all of my instructions on the law. You are not to pick out one instruction or part of one and disregard the others. However, after you have determined the facts you may find that some instructions do not apply. You must then consider the instructions that do apply together with the facts as you have determined them. Decide the case by applying the law in these instructions to the facts.

You must find the facts from the evidence. The evidence which you are to consider consists of testimony of witnesses and exhibits. At times I have decided whether testimony and exhibits should be admitted. When an objection to a lawyer's question was sustained you are to disregard that question and you are not to guess what the answer to the question might have been. When testimony was ordered stricken from the court record you are not to consider that testimony as evidence. Do not concern yourselves with the reasons for these decisions. Admission of evidence in court is governed by rules of law.

In the opening statements and in the closing

arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence but it may help you to understand the law and the evidence.

The lawyers are permitted to stipulate that certain facts exist. This means that both sides agree that those facts do exist.

You must decide the accuracy of each witness's testimony. Take into account such things as his ability and opportunity to observe, his memory, his manner while testifying, any motive or prejudices he might have, and any inconsistent statements he may have made. Consider his testimony in the light of all the evidence in the case.

If a witness has been convicted of a felony, that conviction does not necessarily mean that you cannot believe his testimony. A witness's conviction of a felony is one of the circumstances you may consider in determining whether to believe that witness.

The State has charged the defendant with the crime of murder. The charge is not evidence against the defendant. You must not think the defendant is guilty just because he has been charged with a crime. The defendant has pled not guilty. The defendant's plea of not guilty means that the State must prove every part of the charge beyond a reasonable doubt.

The law does not require a defendant to prove his innocence. He is presumed by law to be innocent. This means

the State must prove all of its case against the defendant. The State must prove the defendant guilty beyond a reasonable doubt.

The State must prove all of it's case against the defendant with evidence that the State itself gathers. Therefore the defendant is not required to testify. The decision on whether to testify is left to the defendant acting with the advice of his attorney. You must not conclude that the defendant is likely to be guilty because he does not testify. You must not discuss this fact or let it affect your deliberations in any way.

You must not consider any statements made by the defendant to law enforcement officers -- to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily. The defendant's statement is not voluntary whenever a law enforcement officer used any sort of violence or threats or any promise of immunity or benefit.

Evidence that the defendant may have committed crimes other than that charged is admitted only for a limited purpose. You may not consider such evidence as tending to show that the defendant has a disposition to commit crimes. You may however consider the evidence for other purposes, such as proof of motive, opportunity, intent or identity.

In deciding whether the defendant is guilty or not

guilty, do not consider the possible punishment.

Running away or hiding after a crime has been committed does not in itself prove guilt. You may consider any evidence of the defendant's running away or hiding together with all the other evidence.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of an expert witness. A person who by education, study and experience has become an expert in any art, science or profession may give his opinion as to any such matter. You should consider such expert opinion and should weigh the reasons if any given for it. However you are not bound by such an opinion. Give it the weight to which you deem it is entitled.

If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against their interest.

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events or to produce all objects or documents mentioned or suggested by the evidence.

Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact without an inference and

which in itself if true conclusively establishes that fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of any other fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. Under the law circumstantial evidence is just as worthy as direct evidence, provided it satisfies the mind beyond a reasonable doubt of the material facts sought to be proved.

Murder is the unlawful killing of a human being with malice. The thing that distinguishes murder from all other killings is malice. There are two kinds of malice. A person has one kind of malice when he deliberately intends to kill. If you determine that the defendant used a deadly weapon in the killing, you may find malice. If you determine that the defendant has no considerable provocation for the killing you may find malice. There is also a second kind of malice. A person has this kind of malice if he shows a reckless disregard for human life.

Once you have determined that there is malice, you must determine if the murder was in the first or second degree. First degree murder is murder which is the result of premeditation. Premeditation means deciding in the mind beforehand. It does not matter how quickly or slowly the decision to kill is followed by the act of killing.

Murder which is committed in the attempt to commit robbery is also first degree murder.

All other kinds of murder are second degree.

If you have a reasonable doubt about which of the two degrees of murder was committed, you must decide it was second degree murder.

Robbery is the wrongful taking of the personal property in the possession of another from his person or immediate presence and against his will accomplished by means of force or fear.

The crime of first degree murder includes the less serious crime of second degree murder. The State may prove second degree murder but fail to prove the more serious crime of first degree murder. You are permitted to find the defendant guilty of the less serious crime of second degree murder, one, if the evidence does not show beyond a reasonable doubt that the defendant is guilty of first degree murder. Two, if the evidence does show beyond a reasonable doubt that the defendant is guilty of second degree murder.

In the case of certain crimes it is necessary that the criminal act be accompanied by a specific or a particular intent without which the crime is not committed. Thus in the crime of robbery, a necessary fact to be proved is the existence in the mind of the defendant of the specific intent to wrongfully take the personal property in the possession of

another from his person or immediate presence and against his will, and unless such intent to do so exists that crime is not committed.

Force means any physical act directed against a person as a means of gaining control of property.

All 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty.

When you go into the jury room you will choose a foreman who will be in charge during your deliberations and who will sign any verdict. You may come to one of three verdicts. You may return a verdict of guilty of murder in the first degree. You may return a verdict of guilty of murder in the second degree. You may return a verdict of not guilty.

You will be given three forms of verdict on which to indicate your decision. They read as follows. They are in no particular order.

Omitting the caption, they go as follows: We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of first degree murder.

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of second degree murder.

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward

RETURN OF VERDICT

THE COURT: The record will reflect the presence of the defendant, counsel and the jury.

We have received a note at about 7:15 which simply said "We are close to a verdict." I'll just ask the clerk to file that note.

Your foreman is Mr. Henscheid, is that correct?

THE FOREMAN: Yes.

THE COURT: Mr. Foreman, Mr. Henscheid, have you reached a verdict?

THE FOREMAN: Yes, Your Honor, we have.

THE COURT: Please hand the verdict forms to the bailiff.

The clerk will please read and record the verdict, omitting the formal caption.

THE CLERK: "We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of first degree murder."

THE COURT: Ladies and gentlemen of the jury, is this your true and correct verdict?

JURORS: Yes, Your Honor.

THE COURT: Do counsel wish to have the jury polled?

MR. DAWLEY: I don't, Your Honor.

MR. SHAW: Yes, Your Honor, I do.

DAVID W LUNDY/COURT REPORTER

Appendix D

FILED
7:45 O'CLOCK, A M
[AUG 29 1985]
BARBARA BOYLE, Clerk
By Deputy
[Barbara Boyle]

SUPERIOR COURT OF ARIZONA
YAVAPAI COUNTY
PRESCOTT, AZ

1	August 29, 1985	RICHARD ANDERSON	Virginia F. Goldsmith
Div	Date	Judge or Commissioner	Deputy

NO. 8752

STATE OF ARIZONA
VS
EDWARD HAROLD SCHAD, JR.

County Attorney
By: Frank Dawley

Charles Anthony Shaw
Defense Counsel

DATE OF BIRTH: 7-27-42

SENTENCE OF IMPRISONMENT

_____ a.m./p.m. The State is represented by the above named Deputy County Attorney; the Defendant is present with above named counsel.

Court Reporter David W. Lundy is present.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

[ ] **WAIVER OF COUNSEL** The Defendant knowingly, intelligently, and voluntarily waived his right to be represented by counsel after being advised of the right to be represented by counsel including the right to have counsel appointed free of charge if the Defendant is indigent.

[ ] **WAIVER OF JURY TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial by jury after having been advised of his right to same. The determination of guilt was based upon a trial to the Court.

[ ] **WAIVER OF TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial with or without a jury, his right to confront and cross examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty/no contest.

[X] **JURY VERDICT** The determination of guilt was based upon a verdict of guilty after a jury trial.

(Continued)

Appendix E

1 | August 29, 1985 | RICHARD ANDERSON | V. Goldsmith
Div | Date | Judge or Commissioner | Deputy

No. 8752

STATE VS. EDWARD HAROLD SCHAD, JR.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the following crime( ), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Department of Corrections is not appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated sentence as indicated on the following pages. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to Death, and is committed to the Arizona Department of Corrections as follows:

Therefore, it is the Judgment and Sentence of this Court that the Defendant, Edward Harold Schad, Jr., be sentenced to death inflicted by the administration of lethal gas. The execution shall take place at the Arizona State Prison at a time to be fixed by the Arizona Supreme Court if this conviction and sentence are affirmed.

(Continued)

Superior Court of Arizona
Yavapai County

FILED
3:45 O'CLOCK, P M
DEC 14 1978
BARBARA BOYLE, Clerk
By Katherine Wilkes
Deputy

STATE OF ARIZONA,

Plaintiff,

vs

EDWARD HAROLD SCHAD

Defendant(s).

Superior Court No. 8752

Grand Jury No. 12 -GJ- 751

INDICTMENT

(FELONY) [redacted]

The grand jurors of Yavapai County, Arizona, accuse

Edward Harold Schad

charging that in _____, Prescott

Precinct, Yavapai County, State of Arizona:

On or about August 1, 1978 EDWARD HAROLD SCHAD murdered Lorimer Leroy Grove, all in violation of A.R.S. §§13-451, 13-452, as amended and 13-453 A, as amended.

BILLY L. HICKS
[redacted]
Yavapai County Attorney

By _____
Deputy County Attorney

December 14, 1978
Dated

A True Bill
(Foreman writes "A True Bill")

Lawrence L. Lakenmacher
Foreman of the Grand Jury

Form XIII (9-73)

Exhibit A
Page 1 of 1 Pages Appendix F

finished. You'll get a copy to take with you to the jury room, so I'm not going to read them to you now just to repeat them for you.

Let's talk about the specifics of this case. If you look at the easel, members of the jury, I have drawn up the elements, or the components parts, of first degree murder. There are two types of first degree murder, two ways for first degree murder to be committed. On the left is premeditated murder. There are three elements to that. One, that a killing take place, that the defendant caused someone's death. Secondly, that he do so with malice, And malice simply means that he intended to kill or that he was very reckless in disregarding the life of the person he killed.

And you will also be instructed that if the defendant used a deadly weapon, as he did in this case, the ligature, that you may find the intent to kill from the use of that deadly weapon.

And along with the killing and the malice, attached to that killing is a third element, that of premeditation, which simply means that the defendant contemplated that he would cause death, he reflected upon that.

The other type of first degree murder, members of the jury, is what we call felony murder. It only has two components parts. One, that a death be caused, and, two, that that death be caused in the course of a felony, in this case a

robbery. And so if you find that the defendant committed a robbery and killed in the process of that robbery, that also is first degree murder.

If you'll look at the easel toward the lower left-hand corner there, members of the jury, I have put the word second degree and then under that no premed.

All that means to say is the difference between premeditated first degree murder and second degree murder is that the first two elements, a killing with malice, do apply but if there's no premeditation then it's second degree murder.

You'll be given three forms of verdict in this case, guilty of first degree murder, guilty of second degree murder, or not guilty.

If you find either a premeditated murder or a felony murder, then you will find the defendant guilty of first degree murder.

In this case, both types of first degree murder apply.

Exhibit 31 is the autopsy photograph that was identified by Dr. Keen. It's not a very pleasant photograph but it's black and white and it's not all that gruesome and it was offered for a very specific purpose, not to excite you or get you emotional but to show you the rope, to show you the weapon and where it was located.

And from the body of Mr. Grove we know a lot about

similar at all, they were completely different.

What about the statements of Ed Schad? What do they show? We have statements of Ed to a trooper in New York to, to Detective Johnson in Salt Lake City, that he was delivering this Cadillac for an elderly person. In one case he was delivering it to somebody in New York, I forget who the other guy said, maybe they were both -- well, yeah, one was Bridgeport, New York, the other was New York City, which he had been.

Ed Schad, I'm not going to stand up and say that he is without any blemish at all. He was in control of somebody else's car. I think he knew that. He was in control of somebody else's credit card. I think he knew that; he was forging it. He was a thief at that time, but he was not -- that does not mean, does it, that he was a murderer? This is a common statement, is it not? Consider it. If you are in somebody else's car, what's the normal explanation you are going to give if you want to give an explanation as to why you have got that car? That you are delivering it for somebody and that you are delivering it for an elderly person, because it's an elderly person you would think who doesn't like to drive. So you are delivering it for him. That's the explanation for that statement.

Now, Mr. Dawley said he made a statement regarding a trade to Wilma in Columbus, Ohio. Wilma didn't say that. That

ORIGINAL

Supreme Court, U.S.
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CLERK

NO. 90-5551

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

EDWARD HAROLD SCHAD, JR.,
Petitioner,

-vs-

STATE OF ARIZONA,
Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment to the United States Constitution require that the jurors in a first-degree murder trial be instructed on and given forms of verdict for both premeditated and felony murder when, under established state law, murder is only one crime regardless of the manner in which the act was committed?

2. Does the Fourteenth Amendment to the United States Constitution require a state trial court to instruct the jurors in a capital murder trial with respect to a nonexistent lesser-included offense?

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OPINION BELOW

On December 14, 1989, the Arizona Supreme Court affirmed petitioner's conviction for first-degree murder and sentence of death. State v. Schad, 163 Ariz. 411, 788 P.2d 1162 (1989). Petitioner's motion for reconsideration was denied on April 18, 1990, and the mandate issued on April 19, 1990.

STATEMENT OF JURISDICTION

On April 18, 1990, the Arizona Supreme Court declined petitioner's motion for reconsideration of the court's opinion affirming the conviction and sentence. Petitioner was granted an extension of time within which to file the pending petition. Said petition was filed on August 16, 1990. This Court's jurisdiction vests pursuant to the United States Constitution, article III, § 2; 28 U.S.C. § 1257(a); and United States Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution.

> **§ 1. Citizenship rights not to be abridged by states**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Arizona, article II, § 23.

> **§ 23. Trial by jury; number of jurors specified by law**
>
> Section 23. The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.
>
> Amendment approved election Nov. 7, 1972, eff. Dec. 1, 1972.

STATUTORY PROVISIONS INVOLVED

Former Arizona Revised Statutes Annotated § 13-451, now Arizona Revised Statutes Annotated § 13-1105(A)(1).

§ 13-451. Murder and malice aforethought defined

A. Murder is the unlawful killing of a human being with malice aforethought.

B. Malice aforethought may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

Former Arizona Revised Statutes Annotated § 13-452, now Arizona Revised Statutes Annotated § 13-1105(A)(2).

§ 13-452. Degrees of murder

A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree. As amended Laws 1973, Ch. 138, § 1.

Arizona Revised Statutes Annotated § 13-453.

§ 13-453. Punishment for murder

A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in § 13-454.

B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years. As amended Laws 1973, Ch. 138, § 2.

STATEMENT OF THE CASE

Seventy-four-year-old Lorimer "Leroy" Grove left his home in Bisbee, Arizona, on August 1, 1978, bound for Everett, Washington, to visit his sister. His badly decomposed body was discovered 9 miles south of Prescott, Arizona, on August 9, 1978. He had been strangled to death by a rope that was tied around his neck. Positive identification of Mr. Grove was not accomplished until October 11, 1978.

Petitioner was arrested in Salt Lake City, Utah, on September 8, 1978, for violating parole for a prior murder conviction in that state. Petitioner possessed Mr. Grove's Cadillac at the time of his arrest, as well as Mr. Grove's wallet and credit cards. Further investigation disclosed that petitioner had been stopped for speeding in Mr. Grove's Cadillac in New York State. He explained to the trooper that he was delivering the car to a Mr. Grove, who lived nearby. Also, a car rented by petitioner and reported as stolen was found near Flagstaff, Arizona, on August 3, 1978. Several items identified as belonging to Mr. Grove were discovered in that vehicle.

The Yavapai County Grand Jury returned an indictment on December 14, 1978, charging petitioner with one count of first-degree murder:

> On or about August 1, 1978, EDWARD HAROLD SCHAD murdered Lorimer Leroy Grove, all in violation of A.R.S. §§ 13-451, 13-452, as amended and 13-453(A), as amended.

Petitioner was convicted by a jury of first-degree murder, and following the required special verdict, was sentenced to death. The Arizona Supreme Court affirmed the conviction and sentence and this Court denied certiorari. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983 (1982).

Petitioner was successful in applying for post-conviction relief. State v. Schad, 142 Ariz. 619, 691 P.2d 710 (1984). On remand, petitioner was retried and again convicted of first-degree murder. The trial court again held that the aggravating factors mandated the death penalty, the Arizona Supreme Court again affirmed the conviction and sentence. State v. Schad, 163 Ariz. 411, 788 P.2d 1162 (1989). Petitioner again seeks review of his conviction by this Court by a pleading dated August 16, 1990.

ARGUMENTS

I

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A UNANIMOUS VERDICT IN STATE CRIMINAL PROCEEDINGS. EVEN IF SUCH A REQUIREMENT EXISTS, IT WAS SATISFIED IN THE PRESENT CASE.

Petitioner contends that the Sixth Amendment to the United States Constitution requires jury unanimity in a capital trial in state courts, not only with respect to the offense charged but to the specific manner in which the defendant committed the offense as well. He argues that a less-than-unanimous verdict allows for a less-than-majority

vote to decide guilt in a capital case. Respondent submits that there is no constitutional requirement of unanimity for state court criminal proceedings and if there was, such a requirement was satisfied in the present case.

Petitioner's theory rests on this Court's decisions in Johnson v. Louisiana, 406 U.S. 356 (1972), Apodaca v. Oregon, 406 U.S. 404 (1972), and Rule 31(a), of the Federal Rules of Criminal Procedure, which requires a unanimous verdict in federal criminal trials. A few federal circuit courts have interpreted the above authority to require unanimity of verdict where the accusation is based on more than one possible act. See United States v. Beros, 833 F.2d 455 (3rd Cir. 1987) (embezzlement); United States v. Payseno, 782 F.2d 832 (9th Cir. 1986) (extortion); United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (sale or receipt of stolen vehicle). A few states have adopted the federal rule where the state constitution, statute, rule of procedure, or case law conforms with federal law. State v. Boots, 308 Or. 371, 780 P.2d 725 (1989).

However, as the Johnson and Apodaca opinions recognize, the Sixth Amendment does not require unanimity of verdict with respect to state criminal proceedings. Justice Powell concluded that jury unanimity is not "in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth

Amendment." Johnson v. Louisiana, 406 U.S. at 373 (Powell, J., concurring). The decision on unanimity of verdict is thus left to the states.

In Arizona, article II, § 23 of the state constitution mandates the unanimous consent of the jurors to render a guilty verdict in a criminal trial. With respect to the crime of first-degree murder, the Arizona Supreme Court has consistently held:

> Appellant raises the argument that he was denied the right to a unanimous jury verdict as guaranteed by Ariz.Const. Art. 2, § 23 because the court failed to give a form of verdict for guilty of premeditated murder and one for guilty of felony murder and none for guilty of first degree murder generally. The theory is that with the forms of verdict given, some jurors could have found him guilty of premeditated murder but not felony murder while the rest could have found him guilty of felony murder but not premeditated murder. Thus, he would be convicted of first degree murder even though the jury could not unanimously agree on what kind of first degree murder he committed.
>
> Although the scenario described by appellant could have occurred, we are not persuaded that he was thereby denied any right. In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. See State v. Axley, 132 Ariz. 383, 646 P.2d 268 (1982). Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, State v. Counterman, 8 Ariz. App. 526, 448 P.2d 96 (1968), the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed. See Counterman, supra, (where two assaults occurred as part of a continuous course of conduct during the same episode giving rise to one charge of assault with a deadly weapon, the right to a unanimous jury verdict did not require the state to elect which assault it would rely on to support a conviction); State v. Dixon, 127 Ariz. 554, 622 P.2d 501 (App.1980) (because A.R.S. § 13-1802 defines only one crime--theft--which can be committed in more than one way, Art. 2, § 23 only requires one form of verdict for theft and not one form for each way in which theft can be committed). Even if the events appellant describes occurred, he was still convicted of first degree murder by a unanimous verdict.

State v. Encinas, 132 Ariz. 493, 496-97, 647 P.2d 624, 627-28 (1982). Since there is but one crime, there is but one verdict; guilty or not guilty of first-degree murder (notwithstanding any lesser-included offenses and affirmative defense verdicts possible under the facts of each case). State v. Arnett, 158 Ariz. 15, 19-20, 760 P.2d 1064, 1068-69 (1988). State v. Emery, 141 Ariz. 549, 551-52, 688 P.2d 175, 177-78 (1984). Under the same rationale, the state is not required to elect between premeditated and felony murder theories when charging or proving first-degree murder, State v. Walton, 159 Ariz. 571, 578, 769 P.2d 1017, 1024 (1989), aff'd on other grounds, Walton v. Arizona, ___ U.S.___, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), nor is the trial court required to instruct the jurors and submit verdicts on alternate theories. State v. Gillies, 135 Ariz. 500, 510, 662 P.2d 1007, 1017 (1983).

The Arizona Supreme Court quoted Encinas in the opinion below. State v. Schad, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989). In doing so, it reaffirmed its interpretation of state law that the state constitutional mandate for unanimity is satisfied by the single verdict of guilty even where the issue is submitted on alternate theories of conduct.

Since there is no federal right applicable to the states on this point, the issue is left for the interpretation of state law by state courts. This state court's opinions recognize the right to a unanimous verdict and assure that criminals are not deprived of that right. In this case, the state court held that petitioner's verdict was unanimous on the crime charged: first-degree murder. Absent any federal constitutional law mandating that jury verdicts reflect the precise act that caused the resulting offense, nothing more is required. There is no constitutional basis on which petitioner can receive certiorari relief.

II

UNDER ARIZONA LAW, THERE IS NO LESSER-INCLUDED OFFENSE TO THE CRIME OF FELONY MURDER. THEREFORE, THE TRIAL COURT DID NOT DENY PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT.

Petitioner's other contention of constitutional error concerns what he describes as a due process right to an instruction and verdict form on a lesser-included offense in this, a capital case. He challenges Arizona's rule of law that there is no lesser-included offense to the crime of felony murder. Respondent submits that this issue of state law does not violate petitioner's Fourteenth Amendment due process rights in any way.

Petitioner relies on this Court's opinion in Beck v. Alabama, 447 U.S. 625 (1980), for his contention that, in a capital case, when the evidence supports a verdict of a

lesser-included noncapital offense, the jurors must be able to consider that offense. Beck is not applicable to Arizona law. In this state, the crime of felony murder includes no lesser offenses. State v. LaGrand, 153 Ariz. 21, 30, 734 P.2d 563, 572, cert. denied, 108 U.S. 207 (1987); State v. Arias, 131 Ariz. 441, 443-44, 641 P.2d 1285, 1287-88 (1982). As explained by the Arizona Supreme Court:

> We do not consider Beck applicable to § 13-1105(A)(2) [formerly Ariz. Rev. Stat. Ann. § 13-452] for several reasons. Beck only dealt with the constitutionality of imposing the death sentence where the jury is not allowed to consider the option of finding the defendant guilty of a lesser included offense. The Alabama statute involved in Beck specifically indicated that the requisite intent to kill could not be supplied by the felony murder doctrine. As was stated by the Court, "[f]elony murder is thus a lesser included offense of the capital crime of robbery-intentional killing. However, under the statute [Ala.Code § 13-11-2(a)] the judge is specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense." 447 U.S. at 628, 100 S.Ct. at 2384-85. Under Arizona law, however, there is no lesser included homicide offense of the crime of felony murder since the mens rea necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony. See State v. Ferrari, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975). It was not error to refuse defendant's requested instructions.

Id. For the reasons stated, there is no due process violation for failure to instruct on a nonexistent lesser-included offense.

CONCLUSION

There is no constitutional right to a unanimous verdict with respect to the specific acts engaged in by petitioner that constitute the offense of first-degree murder. The verdict in this case satisfies the state law of unanimity. Where there is no lesser-included offense as a matter of state law, no lesser-included offense instruction is permitted. Petitioner has not presented any constitutional basis which would justify review by this Court. Therefore, respondent asks that the petition be denied.

DATED this 14th day of September, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed this 14th day of September, 1990, to:

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September 14, 1990

The Hon. Joseph F. Spaniol, Jr., Clerk
United States Supreme Court
Office of the Clerk
Washington, D.C. 20543

Re: EDWARD HAROLD SCHAD, JR. vs. STATE OF ARIZONA
No. 90-5551

Dear Mr. Spaniol:

Enclosed please find for filing the original and 12 copies of the Response to Petition for Writ of Certiorari in EDWARD HAROLD SCHAD, JR. vs. STATE OF ARIZONA, No. 90-5551.

Thank you for your attention to this matter.

Sincerely yours,

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Attorney General

R Wayne Ford

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RWF:map
Enclosure

4631D

Supreme Court, U.S.
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No. 90-5551

In The

Supreme Court of the United States

October Term, 1990

EDWARD HAROLD SCHAD, JR.

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arizona

JOINT APPENDIX

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Petition For Certiorari Filed August 16, 1990
Certiorari Granted October 9, 1990

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CHRONOLOGICAL LIST OF RELEVANT EVENTS

December 14, 1978 – Petitioner indicted for first degree murder

June 18, 1985 – Petitioner's jury trial commences

June 27, 1985 – Jury returns verdict of guilty of first degree murder

August 22, 1985 – Sentencing hearing held before trial judge

August 29, 1985 – Trial Judge sentenced Petitioner to death

December 14, 1989 – Opinion and judgment of Arizona Supreme Court affirming petitioner's conviction and death sentence

March 15, 1990 – Petitioner's Motion for Reconsideration filed

April 17, 1990 – Order of Arizona Supreme Court denying Petitioner's Motion for Reconsideration

---

SUPERIOR COURT OF ARIZONA
YAVAPAI COUNTY

STATE OF ARIZONA, Plaintiff, vs EDWARD HAROLD SCHAD Defendant(s).	)	Superior Court No. 8752 Grand Jury No. 12-GJ-751 INDICTMENT (FELONY)

The grand jurors of Yavapai County, Arizona, accuse Edward Harold Schad charging that in ___, Prescott Precinct, Yavapai County, State of Arizona:

> On or about August 1, 1978 EDWARD HAROLD SCHAD murdered Lorimer Leroy Grove, all in violation of A.R.S. §§ 13-451, 13-452, as amended and 13-453 A, as amended.

BILLY L. HICKS
Yavapai County Attorney
By /s/ Billy L. Hicks
County Attorney

December 14, 1978
Dated

A True Bill
(Foreman writes
"A True Bill")

/s/ Illegible
Foreman of the
Grand Jury

Exhibit A
Page 1 of 1 Pages

Superior Court of Arizona
Yavapai County

(Caption omitted in printing)

DEFENDANT'S PROPOSED INSTRUCTION NO. 29

ROBBERY

The crime of robbery requires proof of the following four things:

(1) The Defendant took another person's property from his person or immediate presence; and

(2) The Defendant intended to take the property from the other person permanently; and

(3) The taking was against the other person's will; and

(4) The Defendant threatened or used force against the other person with the intent to force surrender of the property or to prevent resistance to taking or keeping the property.

AUTHORITY: RAJI Criminal Instruction 19.02 as modified by RAJI Crimes 11 and the facts of this case.

DEFENDANT'S PROPOSED INSTRUCTION NO. 31

LESSER INCLUDED OFFENSE OF ROBBERY

The crime of robbery includes the less serious crime of theft. The State may prove theft beyond a reasonable doubt, but fail to prove the more serious crime of robbery beyond a reasonable doubt.

The crime of theft requires proof of the following two things:

(1) The Defendant knowingly controlled another person's property; and

(2) The Defendant intended to deprive the other person of the property.

If you find that the Defendant committed a theft rather than a robbery, then you must find him not guilty of first degree murder based on his having committed or attempted to commit a robbery.

AUTHORITY: RAJI Criminal Instruction 1.03; RAJI Criminal Instruction 18.021; *State v. Celaya*, 135 Ariz. 248, 251-253, 660 P.2d 849 (1983).

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

[p. 1343] [Caption omitted]

[Excerpt of settling of
jury instructions and
verdict forms)
Flagstaff, Arizona
June 27, 1985

* * *

[1344] THE COURT: Now, 31, I'm refusing that. That's the one that talks about theft.

MR. SHAW: I object to the refusal of 31 on the basis of State v. Salia [sic], can cite the case for that.

THE COURT: Okay. I don't think Salia [sic] fits that.

* * *

You have looked over the forms of verdict. Any problems with those?

MR. SHAW: No.

MR. DAWLEY: No, Your Honor.

* * *

[p. 1347] [Excerpt of Prosecutor's closing argument]
Flagstaff, Arizona
June 27, 1985

* * *

Let's talk about the specifics of this case. If you look at the easel, members of the jury, I have drawn up the elements, or the components parts [sic], of first degree murder. There are two types of first degree murder, two ways for first degree murder to be committed. On the left is premeditated murder. There are three elements to that. One, that a killing take place, that the defendant caused someone's death. Secondly, that he do so with malice. And malice simply means that he intended to kill or that he was very reckless in disregarding the life of the person he killed.

And you will also be instructed that if the defendant used a deadly weapon, as he did in this case, the ligature, that you may find the intent to kill from the use of that deadly weapon.

And along with the killing and the malice, attached to that killing is a third element, that of premeditation, which simply means that the defendant contemplated that he would cause death, he reflected upon that.

The other type of first degree murder, members of the jury, is what we call felony murder. It only has two components parts [sic]. One, that a death be caused, and, two, that that death be caused in the course of a felony, in this case a [1348] robbery. And so if you find that the defendant committed a robbery and killed in the process of that robbery, that also is first degree murder.

If you'll look at the easel toward the lower left-hand corner there, members of the jury, I have put the word second degree and then under that no premed.

All that means to say is the difference between premeditated first degree murder and second degree murder is that the first two elements, a killing with malice, do apply but if there's no premeditation then it's second degree murder.

You'll be given three forms of verdict in this case, guilty of first degree murder, guilty of second degree murder, or not guilty.

If you find either a premeditated murder of a felony murder, then you will find the defendant guilty of first degree murder.

In this case, both types of first degree murder apply.

* * *

[p. 1363] [Excerpt of Defense Counsel's Closing Argument]
Flagstaff, Arizona
June 28, 1985

* * *

Now the State will argue, well those don't have any relevance. Who knows what they might have? The point is a sheriff's deputy seized them and thought it had relevance, thought they were going to be fingerprinted and then they weren't. The mirror which was found in the Ford automobile, [1364] the only item there that tended to connect the Ford automobile with the victim, was not fingerprinted. You heard all of the evidence from all of the police officers, even the ones who didn't fingerprint it, that it should have been fingerprinted.

How is this important? Well, it's important because there was evidence that was fingerprinted in the Ford automobile. Thank goodness we had the Coconino County sheriff's people who at least had the foresight to take fingerprints of that Ford. And they lifted seven to ten fingerprints, one witness said seven, the expert witness for the defense said ten, from areas in which the driver would have touched that automobile. Those fingerprints did not match any of the people whom we know touched that automobile.

I submit to you if the State had have taken fingerprints of the Cadillac automobile, if it had matched any of those, any of the unidentifiable fingerprints on the Ford automobile, we would then have had somebody else that was involved with this murder, somebody else who could have done this job.

We don't have any testimony as to how Mr. Schad would have acquired the car that he acquired or how he acquired the credit cards, but we do have evidence now that somebody else was also in that vehicle.

Now the State probably is going to stand upon in a few minutes, when they get their turn, and say, well, the fact that [1365] there are no fingerprints that are identifiable isn't important, because that could be anyone. I submit to you Officer Richardson, when he found that automobile – what did he say? Did he say that had been stripped, that it had been gone through, people had been there putting their hands on it? No.

And we know that automobile had been in Phoenix on August the 1st, 1978. It was noticed on this highway 89, north of Flagstaff, at 6:30 in the morning. That's pursuant to the testimony of Richardson, on August the 3rd, 1978, so it would have been there for about a day. And there was no evidence of any tampering with it. So we do know, in light of the fact that Ed Schad had driven that automobile, Wilma Ehrhardt had been in that automobile, that since his fingerprints aren't on that automobile in places where the driver would have driven, that somebody else was connected to that car.

We also know that the murderer may we [sic] have touched that Ford – that mirror which was found in the Ford. If fingerprints had have been taken and Ed Schad's would have been excluded, again that would have been a very important piece of evidence for the defendant. That's why we have the instruction that since the evidence was not preserved you may infer the true fact would have been against the State.

What else was done in this case to tend to show this? A serological exam was done. I'm not sure whether it [1366] was performed by the Coconino County sheriff's deputies or by Detective Hansen, but evidence was taken out of the Ford to determine if there was any violence in that evidence. That was the seat cushion. It was sent to the department of public safety in Phoenix. What do we find there? No evidence of blood, no evidence of stains, no evidence of violence.

We find from Sergeant Judd at the scene of the Ford no evidence of any violence, no evidence of any blood, no evidence of anything, of any wrongdoing at that time. So once again we find more and more facts that tend to show that the crime could not have occurred where the Ford was.

Let me talk to you as to why that's important. If the murder occurred where we suggested it occurred, right where the body was found, off of the pulloff area south of Prescott, there appears to be no possible way Ed Schad could have been driving that Ford, met the victim and murdered him there, because he was known to be alone, and there's no way that he could have handled two cars to one time and somehow deposited the Ford 150 miles north where it was found, or north and west. So that's impossible.

So that's why the State's only theory in this case – and they haven't talked about it but I suppose they are going to in in [sic] rebuttal – was that the murder would have had to have happened where the Ford was, and that's where they spent all the time they tried to to [sic] get this route of Lakeside into [1367] evidence, to get the

victim going to Lakeside, because then it would be more likely he could have wound up north of Flagstaff where the Ford was, rather then where his body was found south of Prescott.

I'll talk about that in a minute, but let me get back to the evidence which we don't have.

We don't have fibers, any hairs taken off the body. You heard the medical examiner, Dr. Keen, testify that it's common to take fibers off the shirt and so forth, it's common to take hairs. One of the reasons why he didn't do it is he doesn't have the kind of laboratory, the kind of facilities, that Dr. Halpern has in New York City. And I ask you, should we – is it right that we would get a fairer shake if we were a defendant in a case like this in New York City than we would in Prescott, Arizona? Does it really make sense that some communities ought to get better investigation? I don't think so.

No fingernail scrapings were done. Dr. Keen has testified that the murdered, the killer, would have been to the front of the victim. He would have murdered him right here where the hyoid bone was broken, to the right front, that very likely there would have been a struggle, he testified, because it would have been improbable for the rope to be put around the neck while the other person is sleeping without some sort of a struggle and being strangled from the front. Therefore there's [1368] likelihood of the scratching and the clawing out. No fingernail scrapings were taken from the victim. No scrapings were compared with the defendant. If they had have been compared and excluded by the defendant, they would have been evidence helpful to him in this case.

We also know from the trooper that saw Mr. Schad and from the – on September the 3rd, and from the people that saw him on September the 7th and 8th, that Mr. Schad did not have anything wrong with his appearance, his face, did not have any scratches. So that again tends to go along with the fact that if this evidence had have been taken, it would have tended to exclude Ed from this case, and that's why again we have the instruction that you're going to get.

We had no inventory of any of the items found in the Cadillac until December the 5th by Detective Hansen. We had a moving of those items by Detective Halterman from the interior of the Cadillac to the truck of the Cadillac. We had clothing on the body which was destroyed by the medical examiner's office, and he knew that was not proper but he did it because he didn't think it had any relevance, but yet he didn't keep it so it could be compared with any transfers from any of the cars in this case. We had had the keys which were found on the body also destroyed.

What significance does that have to the case? We do know that there is a trailer missing in this case, and I submit [1369] to you that that trailer has never been found. The trailer has been investigated by Detective Hansen. He checked every state in the union, 48 states, to see if they had any evidence of it. He flew over the area from a little bit north of Prescott to way south of Prescott, found no evidence of it. Lynn Bell testified yesterday afternoon that he sent a wants check himself to every motor vehicle department in every state in the union, including Alaska, and he found no evidence of it.

Is it reasonable to assume, I ask you, that Ed Schad would have sold that trailer to somebody and somehow it never got reported or never got any title to it? Especially when Ed Schad, as the trooper mentioned, accidentally gave the trooper the trailer title which was in the car when he was given a speeding ticket on the 3rd of August, 1978? Or is it more reasonable that that trailer might have been buried somewhere never to be able to be found again, which it has never been found. And with regard to the trailer, the keys that were taken off the body and now have become destroyed by State, may have been important. If there wasn't a trailer key in that group of keys, we know from Dr. Keen's testimony there were six or seven keys, if there wasn't a trailer key, that would tend to show, would it not, that the person who was involved with Mr. Grove at the time of his death was close to him, knew about the trailer and the keys and was more likely to get that key, somebody who had an association with Mr. Grove. That's an [1370] important factor also.

Regarding the mirror in the Ford, again don't speculate. What else do we have in this case that is suspicious and that there is no – the State can give no reason for being there?

We have Trilogy clothing. You heard us mention that on many occasions. It has snags on it, it has stains on it that have never been analyzed, have never been compared with samples of the vegetation at the scene.

We have clothing that was not owned or worn by Wilma Ehrhardt.

Do you remember when she testified, and I had her stand up to see if it fit, and most of you stood up to make sure about this, she put it up to her waist, and unlike me it went way to the bottom, because she's five foot two and I'm six feet tall. So it obviously doesn't fit her. There's no other person in this case that could fit that clothing.

We have a rust – a red rust robe also that's found in the Ford automobile. You saw that when Ms. Ehrhardt tried that on, or I don't know if she tried it on but she looked at it, she said it was not hers. It's got a lot of hair connected to it. You can compare that hair with Wilma Ehrhardt's hair and the color of it and so forth, compare that as another item of evidence that's connected with the Ford.

We have Belair cigarette cartons that are found both [1371] in the Ford, I'm not going to get them out now, but they were found both in in [sic] the Ford and the Cadillac and they are unconnected to either Ed Schad or Wilma Ehrhardt. You heard the testimony of Wilma regarding that.

I might add there was another suspicious item that was found in the Cadillac that – that item found in the Cadillac, I cannot see it here offhand. Oh, here it is, an item found in the Cadillac that came out of the Cadillac, right in this bag, right out of one of the exhibits, it's a National Enquirer of September 12, 1978, and there's an Omaha World Herald newspaper of June 22, 1978, along with more Belair cigarette cartons, Belair cigarette packets.

These were some of the items that came out of that Cadillac automobile also.

Who would have been to Omaha, Nebraska on June 1978? Something for you to consider in this case. Perhaps it's a small point but it is a point.

We have a photograph found of two people at Niagra [sic] Falls, New York. That's found in the Cadillac.

We have just happen to have the coincidence of the Tison gang. You heard the testimony of Lieutenant Judd, just happened to be going up highway 89 on or about August the 1st, 1978. There's no other evidence, but it just happened to be, it's a coincidence and we know that they killed people for their cars. We know that they buried one car. One car was [1372] buried in the Sunset Crater area, I think Lieutenant Judd said, which is not far from where the Ford was found. We also know we have unidentifiable prints found in the Ford.

All these are things for you to think about and consider when you decide whether the State's case against Ed Schad is speculation or conjecture as to whether he would have been the murderer in this case.

Perhaps, ladies and gentlemen, one of the most critical facts in this case is that Lorimer Leroy Grove was known to be taking at least $2,184 in cash with him on his vacation. That was the testimony of Robert Butler who gave him a check on July 31 which was cashed by him. The Arizona Bank fraud investigator Ron Cross, said yes, this check was cashed, no evidence it was deposited.

He had that large amount of money then on his person. There was testimony from Mr. Williamson he

always carried large amounts of cash on his person. There was testimony from his banker Mr. Pilcher yesterday that he was known to carry three and – three to four thousand dollars in cash on his person.

Did Ed Schad, if he had murdered this person, get that cash? Consider that. Consider whether that's reasonable.

Or was Ed Schad totally out of cash by the time he got this Cadillac sometime on August 2nd, 1978, because he immediately and so soon begins using a credit card. If he were [1373] the murderer, would it be logical to begin using the victim's, the person he murdered, credit card then use it throughout the United States for 70 or 80 times that Mr. Dawley talked about? Would this be logical? Or would he use it because he is out of cash? Which we know he was looking for a job, from evidence we found in the Ford, on July 31 and August 1st in the Phoenix area.

We also know that he forged, or evidence is he forged a check to himself for cash on August 7, 1978, in DeMoines, [sic] Iowa. There's another check which is in evidence. So is it logical, I ask you when you consider this case in the jury room, is it reasonable, is it logical, to assume that he would be the murderer knowing this, knowing that he could be easily found out by using that credit card if he had in fact murdered the person?

He doesn't know Mr. Grove. There's no evidence he would have known him before. There is no evidence that they were ever associated, that they had ever been with each other. The evidence was Ed Schad had been in Florida at least to sometime in July and then in Ohio to

July 24th. He didn't know therefore where Mr. Grove was going. If he had have met Mr. Grove he wouldn't know who Mr. Grove was going to see or who would report about him, so therefore consider that cash situation as a factor, and as a factor that further lends to speculation and very much doubt as to whether Ed Schad could [1374] have been the murderer in this case.

Also consider the fact that Ed Schad would have known about the Tisons who would have escaped from the Arizona state prison. Some of those photographs as I pointed out with the Coconino County deputies – not some of the photographs, but some of the newspapers found, the Mesa Tribune and Arizona Republic that were dated July 31 and August 1 have detailed articles. In one case it's a front page article, I believe, about the escape just a day or two before of the Tisons and the fact that everybody in the state, the police agencies, were on a manhunt loking [sic] for them. There was a statewide manhunt.

So therefore when you consider the theory of the Ford, the murder being at the Ford, consider this: Is it likely, is it logical, is it reasonable for a murderer to be traveling with a body 150 miles from the site of that Ford to a pulloff area south of Prescott while all these police are scouring the country for the Tisons? It's an interesting thought and something to also consider.

What do we know about the victim in this case? What suspicious circumstances are there regarding him which the State cannot overcome in this case? Number one, we know in June of 1978 he had used his credit card. He had used it in Sedona at the Oak Creek Owl restaurant. He

had bought $29.68 worth of food. And you heard testimony from the manager of it yesterday that a regular entree was probably in the [1375] neighborhood of $10. Is it possible Mr. Grove was with another person at that time? Consider that and consider the amount of money spent.

You also have a Travelodge credit card use of Mr. Grove's credit card in June 1978 at a Flagstaff Travelodge. Now, we don't know any more as to which one it was. That's why we called both of the Travelodge people here to testify. The downtown Travelodge, the one that wasn't quite as nice, they had records back to that time, and they didn't find it, so I think we can prove by inference that that wasn't the one that Mr. Grove would have been at.

The other Travelodge, the one out on I-40, do not retain their records. So if you compare that with the fact a credit card receipt was used there on Grove's credit card it appears that Mr. Grove was staying in a motel and spending $37.40. There is also a King's Ransom motel in Sedona at about the same time, and a bill there of $29.04.

Did Mr. Grove meet somebody there? Did Mr. Grove have a friend there? Did Mr. Grove meet somebody that might have had a reason to dislike him to know that he always carried a lot of cash on his person and therefore might want to kill him? Did Mr. Grove know about this on July 28, 1978? Was Mr. Grove afraid for his life? Was he being blackmailed? Why does he write a will hurriedly, with abbreviations, not his normal practice, and then says "in case I do not return from Washington."

[1376] These are things which I believe can be considered. Did he meet somebody on the trip? Was he going to

meet somebody in Phoenix or wherever, who may have killed him? That's another factor for you to consider which the State cannot disprove in this case.

And finally we have those joint accounts. We have his own joint account that he had with his wife Lodima which was closed out and money was put into his own account at that time. These were savings accounts and these are in evidence, and we have one substantial withdrawal of $30,000 cash on July the 18th, 1978, and we don't see that money ever being redeposited anywhere. Did he have all have [sic] that money with him on his trip? He did also withdraw another $24,000 on or about August the 1st, the day he left, but that's redeposited. But there's a $30,000 which we don't know what happened to.

What likely happened in this case? Did Mr. Grove leave on August the 1st, 1978, at 9:30 a.m., which is the uncontradicted testimony of Ken Thomas, the last person to see him alive, and did he travel to Washington heading in the northwest direction via the route we have suggested, heading west up I-10 to Phoenix and then over here to Prescott and then out this way, or, as Mr. Dawley I believe wants to suggest, going in a different direction, way over here in the Lakeside area, which is right here, and stopping to see people who we don't know anything about, who an investigation was made and [1377] they were never discovered, who they are unnamed people? Which is logical? Consider that in your conclusions as to what route he was going.

We do know that the route to where the body was found is 310 miles. It's about a day's drive if you leave at 9:30 in the morning, you are probably going to get there

about four – to that point about four or five in the afternoon. We do know that the body is found by a pulloff area in a – in the Prescott national forest. It's right before four campgrounds. We do know that Mr. Grove frequently goes to national forest campgrounds, Mr. Williamson said that. He frequently takes his trailer and he uses it. We do know from Mr. Williamson that he frequently stops, I believe he said, at pulloff areas. This happens to be a pulloff area where his body was found which had shade, which was relatively secluded, and which was one that likely he would stop at. It was the most direct route to the state of Washington. It had evidence of public use.

Did he go there? Did he meet somebody in Phoenix or somewhere along the way? Did he take him with him? Did the person – did somebody kill them there? Was he met by somebody else who would have killed him there? Was he met by the Tisons, for all we know, who needed a car, who needed to get rid of cars fast? Consider all these possibilities.

Also consider the fact that two people must have been involved in the murder. The body was found neatly placed. [1378] Now this is a man, I think he said he was five feet ten, Dr. Keen said. I don't know if his weight was mentioned. I thought he said 160 or 145 pounds. I think a weight was mentioned. We have a person who would be dead. If he were killed as the State is going to surmise, somewhere other than the point where the body was found, there's no evidence of any dragging of that body through the thick brush. There's no evidence of that, so therefore it seems logical to assume there would have been two people that could have carried that body,

two people that would have been involved, two people that would have placed it neatly. Mr. Schad was always known to be alone.

The Ford area. There was no pulloff where the Ford was found. The Ford was found in an area that did not have public use, that had big pits next to it. If a killing would have occurred there, is it likely to assume that the body could have been buried very easy in that pumice material? The pumice is in evidence and you heard the testimony from Mr. Bell about that. There's no evidence, as I mentioned a minute ago, of any violence at the site of the Ford. Is it logical to assume then that a person would kill somebody at the site of the Ford, leave the Ford there, take the Cadillac, travel in the Cadillac with the body, where there's no evidence in the Cadillac whatsoever of any violence or any evidence of any bloodstains or anything, and then just happen to deposit that body at a pulloff area in the Prescott national forest in the type of [1379] area that Mr. Grove with [sic] would naturally want to stop at, and pass up thousands, literally thousands of other places on the way where the body could have been put, hidden, in a manner that it most likely never would have been found. Is that likely? Consider that when you discuss the evidence in the jury room.

Also consider the fact that in that drive the person would have to drive right through the center of the city of Prescott in order to get south of Prescott on Highway 89 into the White Spar area, and this would have to be again after a 150 mile trip.

So I ask you, is there any proof beyond a reasonable doubt that Ed Schad could have been the murderer in this

case? Absolute firm proof, not subject to any conjecture or speculation? If he had, he would have had to have killed him north of Flagstaff where the Ford was found. Consider all of that with the evidence in the case.

Did the State stop trying to solve this crime when they found evidence of a forgery and in control of somebody else's car? That's what they found. Did they stop doing their work? Did they – they didn't seize any of the evidence at the scene. As a matter of fact the chief investigator didn't testify, and there's no police report out of him, who was at the scene of the body. The officers who testified about that, Mr. Hansen and Mr. Williams do not know who was in charge. Mr. [1380] Hansen was in the internal investigation at that time. He was helping out Capp Bates at that time with photography. Does this fact, the fact of the investigation by the State, make a difference in this case? Does it lead to a theory? Consider that when you decide whether the State has proven beyond a reasonable doubt that Ed Schad is connected with this murder.

There were cans of cord that have been introduced into evidence by the State found at the home of Mr. Grove, at his trailer home, the one that was in Bisbee, not the travel trailer with him.

Mr. Dawley introduced those into evidence, and pointed out that there's a loop on the end of them that is somewhat similar to the murder weapon. We have loop on the end of it. I don't know what significance he thinks that has other than the fact that it may tend to indicate that if the murder weapon rope is one of Mr. Grove's very own ropes and it comes out of his house, then that

somebody who knew him at his house and would have been at his house could have been the murderer. Somebody such as the person in Alaska, Joe Macalester who we have never seen or heard from since and Mr. Williamson tried to contact after that. He's disappeared in Alaska. But despite that the evidence is, through the FBI rope examiner, hair examiner, who has done an investigation at our request, at the defense request, and was asked to do some investigation right before you here in Court, testified that these ropes were not [1381] similar at all, they were completely different.

What about the statements of Ed Schad? What do they show? We have statements of Ed to a trooper in New York to, to Detective Johnson in Salt Lake City, that he was delivering this Cadillac for an elderly person. In one case he was delivering it to somebody in New York, I forget who the other guy said, maybe they were both – well, yeah, one was Bridgeport, New York, the other was New York City, which he had been.

Ed Schad, I'm not going to stand up and say that he is without any blemish at all. He was in control of somebody else's car. I think he knew that. He was in control of somebody else's credit card. I think he knew that; he was forging it. He was a thief at that time, but he was not – that does not mean, does it, that he was a murderer? This is a common statement, is it not? Consider it. If you are in somebody else's car, what's the normal explanation you are going to give if you want to give an explanation as to why you have got that car? That you are delivering it for somebody and that you are delivering it for an elderly person, because it's an elderly person you would think

who doesn't like to drive. So you are delivering it for him. That's the explanation for that statement.

Now, Mr. Dawley said he made a statement regarding a trade to Wilma in Columbus, Ohio. Wilma didn't say that. That [1382] was a misstatement on Mr. Dawley's part. Wilma said that she had been left by him when he was going to look for work in Columbus, Ohio, and she didn't know where he had made the trade. But it's all consistent.

Now, then, Mr. Schad talks to Mr. Johnson, and when does he say he doesn't want to talk? When does he want to invoke his rights not to talk to Mr. Johnson? That he feels bad about something, when Mr. Johnson asked him a question about forging his signature, the forgeries he had done, the check he had done. At that point the questioning is stopped. Not when he asked him about how he gets the Cadillac. That's an interesting fact I think for you to consider in this case.

What about the murder rope, the little rope which is exhibit 1, which you'll get a chance to look at? What kind of rope was it? It's a kind of rope which can be used in awnings, said the FBI expert Jack Quill, the kind of rope that can be used by campers and back packers. That's a significant fact when Mr. Grove's body is found in the Prescott national forest near places where people camp.

What about the ring? There's no evidence that – no evidence whatsoever in this case about what Ed Schad knew about the ring. We do know Wilma first saw the ring in the glove compartment of the Cadillac. The assumption there is Mr. Grove would have put that ring, if he had it, in the glove compartment. We don't know

what Ed Schad said about that. The [1383] State didn't rpve [sic] you any connection that Ed Schad had it personally. The State objected to any testimony by Wilma as to what Ed Schad commented to her when the ring was found.

Has anybody, has any witness testified in this case where the murder occurred? No, but I submit to you the murder occurred right where the body was found. Isn't that the logical thing to assume, in light of all the other facts and inferences that are in this case? Is it possible that Ed Schad had ever met Larry Grove before? We know in June through at least July 24th, Ed Schad was thousands of miles away from the state of Arizona. He could not have gotten to Arizona until sometime after July 24, for the very first time.

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[p. 1403] [Excerpt of Judge's instructions to the jury]
Flagstaff, Arizona
June 27, 1985

* * *

Murder is the unlawful killing of a human being with malice. The thing that distinguishes murder from all other killings is malice. There are two kinds of malice. A person has one kind of malice when he deliberately intends to kill. If you determine that the defendant used a deadly weapon in the killing, you may find malice. If you determine that the defendant has no considerable provocation for the killing you may find malice. There is also a second kind of malice. A person has this kind of malice if he shows a reckless disregard for human life.

Once you have determined that there is malice, you must determine if the murder was in the first or second degree. First degree murder is murder which is the result of premeditation. Premeditation means deciding in the mind beforehand. It does not matter how quickly or slowly the decision to kill is followed by the act of killing.

[1404] Murder which is committed in the attempt to commit robbery is also first degree murder.

All other kinds of murder are second degree.

If you have a reasonable doubt about which of the two degrees of murder was committed, you must decide it was second degree murder.

Robbery is the wrongful taking of the personal property in the possession of another from his person or

immediate presence and against his will accomplished by means of force or fear.

The crime of first degree murder includes the less serious crime of second degree murder. The State may prove second degree murder but fail to prove the more serious crime of first degree murder. You are permitted to find the defendant guilty of the less serious crime of second degree murder, one, if the evidence does not show beyond a reasonable doubt that the defendant is guilty of first degree murder. Two, if the evidence does show beyond a reasonable doubt that the defendant is guilty of second degree murder.

In the case of certain crimes it is necessary that the criminal act be accompanied by a specific or a particular intent without which the crime is not committed. Thus in the crime of robbery, a necessary fact to be proved is the existence in the mind of the defendant of the specific intent to wrongfully take the personal property in the possession of [1405] another from his person or immediate presence and against his will, and unless such intent to do so exists that crime is not committed.

Force means any physical act directed against a person as a means of gaining control of property.

All 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty.

When you go into the jury room you will choose a foreman who will be in charge during your deliberations and who will sign any verdict. You may come to one of three verdicts. You may return a verdict of guilty of murder in the first degree. You may return a verdict of

guilty of murder in the second degree. You may return a verdict of not guilty.

You will be given three forms of verdict on which to indicate your decision. They read as follows. They are in no particular order.

Omitting the caption, they go as follows: We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of first degree murder.

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of second degree murder.

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward [1406] Harold Schad, Jr., not guilty.

Counsel, are there any additions or corrections to the instructions?

MR. DAWLEY: I have none, Your Honor.

MR. SHAW: No, Your Honor.

* * *

IN THE SUPERIOR COURT

Of the State of Arizona,
In and For the County of Coconino

(Caption Omitted In Printing)

NO. 8752
VERDICT

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of First Degree Murder

/s/ Kenneth J. Henscheid
Foreman.

SUPREME COURT OF ARIZONA,

En Banc.

163 Ariz. 411

STATE of Arizona, Appellee,

v.

Edward Harold SCHAD, Jr., Appellant.
No. 4876-3.

Dec. 14, 1989.

WILLIAM F. HOLOHAN, Justice (Retired).

The defendant, Edward, Harold Schad, Jr., was convicted by a Yavapai County jury of first degree murder and sentenced to death. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982). On the defendant's petition for post-conviction relief, this court reversed the conviction, holding that the trial court committed fundamental error by instructing the jury on felony murder without defining the elements of the underlying felony. *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984). On remand, the defendant was again convicted of first degree murder and sentenced to death. This appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4031.

The facts of this case are fully set forth in our 1981 opinion, *supra*. Briefly summarized, the following facts led to the defendant's conviction in the second trial.

The victim, Lorimer "Leroy" Grove, was last seen alive on August 1, 1978, when he left Bisbee, Arizona for Everett, Washington in his new Cadillac. His body was discovered August 9, 1978, off the highway just south of Prescott. The corpse was not identified until October 11,

1978, after the defendant's arrest. The killer had strangled the victim to death with a small rope tied around his neck.

The defendant's connection with the homicide is established only by circumstantial evidence. Beginning with the day after the victim left Bisbee, the defendant made numerous purchases with the victim's credit cards. The police recovered credit cards from the defendant's wallet after his arrest. The state also introduced a forged check drawn on the victim's bank account and made to the defendant's order for "wages." A car the defendant had rented, but never returned, was discovered in Flagstaff in early August, 1978. Discovered in this car was a "unique mirror contraption" designed and built by the victim. On September 3, 1978, New York authorities issued the defendant a speeding ticket for an offense he committed while driving the victim's Cadillac. The defendant explained to the citing officer that the car belonged to his friend Leroy Grove. Late in September, the defendant drove the Cadillac to Salt Lake City, Utah. While he was in Utah, the Salt Lake City police arrested the defendant for investigation of a possible parole violation and possession of a stolen vehicle. During his incarceration in the Salt Lake City jail, the defendant spoke with John Duncan[1] and made several inculpatory statements. Thereafter, a Yavapai County Grand Jury indicted the defendant for the murder of Lorimer Grove and the authorities extradited the defendant to Arizona to stand trial.

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[1] Duncan had been staying with the defendant's girlfriend when the defendant arrived in Salt Lake City.

The defendant raises the following issues for our consideration:

1. Did admitting statements that the defendant made to John Duncan in the Salt Lake City jail violate the defendant's constitutional rights?

2. Was the defendant denied a fair trial when the state failed to preserve the victim's clothing and preserve fingerprint impressions on items found with the body and on the mirror contraption?

3. Did the trial court commit error by failing to instruct the jury on, and provide a form of verdict for, the lesser-included offense of robbery?

4. Did the trial court err when it refused to give forms of verdict for both premeditated murder and felony murder?

5. Was it proper to use the defendant's prior murder conviction as an aggravating factor?

6. Were the defendant's double jeopardy rights violated when two aggravating factors were found based on a single prior conviction?

7. Were the defendant's rights violated when the trial court found that the the [sic] defendant committed the murder for pecuniary gain?

8. Did the court fail to properly weigh the mitigating circumstances?

9. Did the defendant's "inability" to "voir dire" the trial judge deprive him of a fair trial?

10. Is Arizona's statutory death sentencing scheme unconstitutional?

In addition to addressing the issues raised by the defendant, we independently review the aggravating and mitigating circumstances found by the judge, determine whether the defendant's sentence is proportional to similar cases, and search the record for fundamental error.

THE STATEMENTS

At the defendant's second trial, as in the first trial, the court permitted the state to present testimony by John Duncan concerning statements the defendant made to him when he visited the defendant in the Salt Lake City jail. The defendant's most incriminating statement was that he would "deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona."

This court reviewed the circumstances surrounding Duncan's testimony in our 1981 opinion in light of *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). *Schad*, 129 Ariz. at 565 633 P.2d at 374. We found that Duncan and the Utah authorities had no agency relationship, that the police did not actively or deliberately solicit Duncan's assistance and that the evidence obtained was insignificant. Therefore, we concluded that the trial court properly denied the defendant's motion to suppress the statements. *Schad*, 129 Ariz. at 566, 633 P.2d at 375. Nevertheless, the defendant's counsel again moved to suppress the statements prior to the second trial because new evidence allegedly

justified a rehearing and established grounds for suppressing the testimony at the new trial. This new evidence consisted of:

> 1. Testimony from Sergeant Judd of the Coconino County Sheriff's office that Detective Halterman described Duncan as an "informant" and a "confidential informant."
>
> 2. Testimony that Detective Halterman had asked Duncan if he would be willing to visit the defendant in jail and arranged the visit for a Monday. Monday was not a normal visiting day, so Duncan could not have made the visit without special arrangements.
>
> 3. Detective Halterman arranged for Duncan's release pending extradition.

Despite this "new evidence," the trial court again denied the defendant's motion to suppress. The judge concluded that the use of the word "informant" by Detective Halterman was a matter of semantics rather than of substance. In his ruling the judge stated:

> The Halterman testimony was rather clear, was extremely clear and unequivocal relative to the witness Duncan's not being, term of act, a confidential informant. The way we come up with the language confidential information and informant in this particular case is from Lieutenant Judd from his police report . . . but of course as you know, Lieutenant Judd had no facts upon which to base a conclusion that . . . Mr. Duncan might be what we have come to know as the confidential informant.

R.T. Vol. VI, p. 815.

Halterman denied suggesting a visit with the defendant. In fact, Duncan testified it was his idea. R.T. Vol. VI,

pp. 672 and 809. The record is less clear on who arranged the visit. Duncan stated that he thought that Detective Halterman or someone from the police department arranged his visit. *Id.* at 804. Nevertheless, the evidence established that the police did not tell Duncan to visit Schad or what questions he should ask. Furthermore, the homicide investigation had yet to focus on Schad because Detective Halterman did not learn that the owner of the Cadillac was dead until a month *after* Duncan's visit. *Id.* at 666, 803. Finally, Duncan's release pending extradition was arranged prior to the Schad case coming to light for reasons separate and apart from Duncan's subsequent assistance in this case.

It is unnecessary to review the relevant case law. We do not find the defendant's evidence any more compelling than the last time. The record supports the judge's ruling. We find no error in denying the defendant's motion to suppress.

PRESERVATION OF EVIDENCE

The state did not (1) preserve the victim's clothing; (2) fingerprint items found with the body; or (3) fingerprint the mirror device found in the defendant's abandoned rental car. The trial court did give a *Willits* instruction.[2] *State v. Willits*, 96 Ariz. 184, 393 P.2d 274

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[2] The jury was instructed:

> If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed or allowed to be destroyed any evidence whose contents or quality is in issue, you may infer that the true fact is against their interest.

(1964). Despite this instruction, the defendant argues that the state's failure to process these items, especially the mirror, deprived the defendant of exculpatory evidence in violation of his due process right to a fair trial. The defendant contends that had these items been processed, he could have proved that someone else committed the crime.

The state counters that the defendant is barred from relief because he failed to raise this issue at the first trial. The only case cited by the state is inapposite because it concerns waiver of issues by failure to object at trial. Although the defendant did not raise this issue until the second trial, we find that his pretrial motions properly preserved this issue for review.

The "substantive" issue raised is whether the state had a duty to preserve the victim's clothing,[3] and to collect and process fingerprints from the mirror and other objects. The defendant argues that the state's failure to collect *and preserve* potentially exculpatory evidence requires reversal of the conviction and dismissal of the charges. *See California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *State v. Mitchell*, 140 Ariz. 551, 683 P.2d 750 (App.1984).

In *Trombetta*, the U.S. Supreme Court held that the due process clause of the 14th Amendment does not require the state to preserve breath samples in order to introduce the results of breath-analysis tests at a DUI

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[3] It should be noted that the state's expert testified that the victim's clothes were forensically useless due to the advanced state of decomposition.

trial. 467 U.S. at 491, 104 S.CT. at 2535, 81 L.Ed.2d at 423. Under the Federal Constitution, the state's duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 488, 104 S.Ct. at 2534, 81 L.Ed.2d at 422. This materiality test requires that the evidence (1) possess an exculpatory value that was apparent before the evidence was destroyed and (2) be such that the defendant would be unable to obtain comparable evidence by other reasonable means. *Id.* at 489, 104 S.Ct. at 2534, 81 L.Ed.2d at 422. The Court concluded that "the chances are extremely low that preserved [breath] samples would have been exculpatory." *Id.*

Recently, we held that a *Willits* instruction adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced or the state acted in bad faith. *State v. Tucker*, 157 Ariz. 433, 442-43, 759 P.2d 579, 588-89 (1988). *Tucker* held that the partial latent fingerprints destroyed by the state "had some forensic value in excluding the defendant from having left the prints," but "coult not have excluded Tucker from having handled the gun, and certainly could not have excluded him from committing the crime." *Id.* at 442, 759 P.2d at 588. Thus, we concluded that a *Willits* instruction adequately protected the defendant's rights. *Cf. State v. Hannah*, 120 Ariz. 1, 583 P.2d 888 (1978) (where the only items connecting the defendant to the crime were destroyed, we found that the defendant had been so seriously prejudiced by the loss of the evidence that he could not receive a fair trial).

The state concedes that any recoverable fingerprints which may have existed were probably destroyed in the defendant's first trial. The state urges us to consider that the defendant had ample opportunity to analyze the mirror before the prints were destroyed and that defense counsel participated in their destruction. It may well be that the defendant's counsel participated in the destruction of evidence. However, the duty to preserve evidence remains with the state and nothing in the record shows the defendant or his counsel solely responsible or more culpable than the state for the loss.

Nevertheless, we find that the *Willits* instruction adequately protected the defendant's rights. Unlike *Hannah*, the mirror was not the only piece of evidence linking the defendant with the crime. The defendant was arrested in possession of the victim's credit cards and car. He told the New York patrolman that he was driving the car for the victim. Furthermore, as we found in *Tucker*, a *Willits* instruction adequately addressed the loss of the fingerprint evidence.

> The best possible scenario for Tucker is that an examination of the partial latent prints would have excluded him from the set of persons whose prints were on the gun. However, as stated above, such an exclusion would not have excluded Tucker from ever having handled the gun and certainly would not exonerate Tucker of the alleged crime. As Tucker's expert explained, Tucker could have touched the gun, but not left a print, or the print could have been easily wiped off either intentionally or unintentionally through subsequent handling. We find no reasonable possibility that defendant was prejudiced by the destruction of the partial latent prints. [Citations omitted.]

> Moreover, under the *Willits* instruction, the jury could infer exactly what the destroyed evidence, at best, could have proved – that Tucker's prints were not on the gun. Under these circumstances, where the destroyed evidence would not exonerate Tucker, and where the *Willits* instruction provided the same benefit as any independent examination of the evidence, the *Willits* instruction protected Tucker's right to a fair trial.

Tucker, 157 Ariz. at 443, 759 P.2d at 589.

Similarly, in the present case, the best that the defendant could hope for is that none of his fingerprints were on the mirror, clothing or other items. While this would have excluded the defendant from the set of persons whose prints were on these items, it would not have excluded the defendant from ever having handled any of these objects, nor would it have exonerated him of the alleged crime. The *Willits* instruction accomplished the most that the defendant could have proved – that his prints were not on these items. We find that the defendant's rights were adequately protected.

FAILURE TO GIVE ROBBERY INSTRUCTION OR FORM OF VERDICT

Here the defendant contests the trial court's failure to give a lesser included offense instruction or to provide a form of verdict for robbery. Defendant argues that *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), requires a robbery instruction and form of verdict because: (1) the evidence supported a conviction for the offense of robbery; and (2) the robbery is a lesser-

included offense of the felony murder because it was the underlying felony.

Although the defendant concedes that he did not request such an instruction of verdict form, he argues that it was fundamental error. He also maintains that counsel ineffectively assisted him in failing to request such instructions. In an Arizona capital case, the trial court must instruct on all lesser-included offenses supported by the evidence. Failure to do so, with or without a request, constitutes fundamental error. *State v. Whittle*, 156 Ariz. 405, 407, 752 P.2d 494, 496 (1988). However, in Arizona there is no lesser-included offense to felony murder. *State v. LaGrand*, 153 Ariz. 21, 30, 734 P.2d 563, 572, *cert. denied*, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987); *see also State v. Leslie*, 147 Ariz. 38, 48, 708 P.2d 719, 729 (1985); *State v. Martinez-Villareal*, 145 Ariz. 441, 446-47, 702 P.2d 670, 675-76, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). Although we agree with the defendant that the evidence supported an instruction and conviction for robbery, we disagree that the underlying felony supporting a felony murder conviction requires a lesser-included offense instruction and form of verdict. *LaGrand*, 153 Ariz. at 30, 734 P.2d at 572. His attorney's failure to request one was not ineffective assistance of counsel.

SINGLE VERDICT FORM FOR FIRST DEGREE MURDER

The defendant next argues that the trial court erred when it submitted to the jury one verdict form for the crime of first-degree murder while instructing them that the crime could be committed in either of two ways – by

premeditation or by the commission of a felony. The defendant's arguments on this issue have all been previously decided by this Court and rejected. In *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982), we stated:

> In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. *See State v. Axley*, 132 Ariz. 383, 646 P.2d 268 (1982). Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, *State v. Counterman*, 8 Ariz.App. 526, 448 P.2d 96 (1968), the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

Id. at 496, 647 P.2d at 627.

Our decision in *State v. Smith*, 160 Ariz. 507, 774 P.2d 811 (1989), did not change the substantive rule that it was not error to have one form of verdict for first degree murder even though both premeditation and felony murder were being submitted to the jury. *Smith* does, however, strongly urge that alternate forms of verdict be submitted to a jury when a case is submitted on alternative theories of premeditated and felony murder. *Id.* at 507, 774 P.2d at 811.

SENTENCE

In the special verdict on the sentence, the trial court found the existence of three statutory aggravating circumstances: previous conviction of an offense for which a sentence of life imprisonment was possible, previous conviction for a crime involving violence, and commission of the murder for pecuniary gain. The trial court found

several mitigating factors, but concluded that they were not sufficiently substantial to call for leniency. The trial court specifically found that the total mitigation was not sufficient to overcome any one of the aggravating circumstances. R.T. August 29, 1985, p. 10. As a result of the court's findings, the defendant was sentenced to death.

THE PRIOR CONVICTION

The defendant's 1968 conviction in the State of Utah for second degree murder was found by the trial court to constitute two aggravating circumstances set out in *former* A.R.S. § 13-454(E)(1) and (E)(2) (now A.R.S. § 13-703(F)(1) and (F)(2)).[4] The defendant attacks the trial court's use of these factors to enhance the penalty to death because: (1) society no longer recognizes sodomy as a felony; (2) there is no crime of felony second-degree murder in Arizona; (3) the present Arizona sodomy statute is unconstitutional; (4) former § 13-454(E)(2) (now § 13-703(F)(2)) is not applicable because the Utah offense did not involve violence; and, (5) the Utah conviction is invalid in light of

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[4] The current version of the statute provides in relevant part:

> F. Aggravating circumstances to be considered shall be the following:
>
> 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

The defendant's conviction of second degree murder occurred in connection with mutual acts of sodomy. The victim was found in a closet with his hands and feet bound and two pieces of cloth around his neck. Apparently, the cloth was tied around the victim's neck for the purpose of restricting the flow of blood to the brain in order to heighten erotic stimulus – a practice known as auto-erotic asphyxiation. In 1968 sodomy was a felony in both Utah and Arizona.[5]

The main thrust of the defendant's argument is that the changes in the criminal code, reducing the punishment for sodomy to a misdemeanor and the elimination of the offense of second degree felony murder, require that the defendant's Utah conviction not be considered an aggravating circumstance for sentencing. The defendant's argument seeks not only to have us ignore the requirement that we consider the penalty imposable at the time of the conviction, but it mischaracterizes the nature of the defendant's Utah conviction.

In considering a prior offense for sentencing purposes, a court looks at the penalty in effect under Arizona law at the time the defendant was sentenced for the prior offense, not the penalty for the prior offense at the time of sentencing for a subsequent conviction. *State v. Tittle*, 147 Ariz. 339, 710 P.2d 449 (1985). The defendant concedes that pursuant to former A.R.S. §§ 13-453(B) and

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[5] The current Arizona statute, in effect since 1978, provides that sodomy is a misdemeanor. A.R.S. § 13-1411.

-1644, the maximum penalty for second-degree murder in 1968 was life imprisonment. *See State v. Williams*, 103 Ariz. 284, 440 P.2d 311 (1968). However, the defendant contends that aggravating his sentence under these circumstances would violate his constitutional rights.

Contrary to the contention implicit in defendant's argument, the prior conviction in Utah was not merely for committing sodomy. The defendant was found guilty of committing a dangerous act while engaging in sodomy. The Utah Supreme Court specifically found that sodomy performed while engaging in auto-erotic asphyxiation constituted a dangerous felony. *See State v. Schad*, 24 Utah 2d 255, 470 P.2d 246 (1970).

> It is so obvious as not to require elucidation that the act of sodomy *committed in the manner shown here*, with the deceased so bound that he choked to death, was an act "greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life."

Id. at 261, 470 P.2d at 250 (emphasis added).

The defendant's second degree murder conviction in Utah was not based on the mere act of sodomy but *the manner* in which it was performed. *Schad*, 24 Utah 2d at 261, 470 P.2d at 250. Irrespective of the debate concerning the constitutionality of statutes prohibiting consensual sodomy,[6] it is clear that a state may lawfully punish a

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[6] Both the United States Supreme Court and this court have held that a state may lawfully prohibit consensual sodomy. *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6, *cert. denied*, 429 U.S. 864, 97 S.Ct. 170, 50 L.Ed.2d 143 (1976).

person for engaging in conduct exhibiting a knowing or reckless disregard for human life. *See* A.R.S. §§ 13-1103(A)(1), -1104(A)(3). This is the crux of the defendant's Utah conviction. Under similar circumstances the defendant's conduct would have constituted second degree murder in Arizona.

CONVICTION FOR FELONY INVOLVING VIOLENCE

The defendant argues that his previous conviction for second degree murder did not involve "violence" within the meaning of A.R.S. § 13-703(F)(2). He argues that the death was an "accident" involving no physical force because he and the victim were consenting homosexual partners. To support this argument, the defendant points to the medical examiner's reports, admitted at the Utah sentencing, stating the the victim had likely tied himself up to heighten his pleasure.

The state argues that murder is inherently a violent crime, and cannot occur absent some type of violence to the victim. *Tittle*, 147 Ariz. at 345, 710 P.2d at 455 (robbery is inherently violent, and so satisfies § 13-703(F)(2)).

It is not necessary for us to resolve this issue because the trial judge, in his special findings, found that the total mitigation present was "not sufficient to overcome any one of the aggravating circumstances." Transcript of Sentencing, August 29, 1985, p. 10. Any one of the other aggravating factors would be sufficient to support the sentence.

TWO AGGRAVATING FACTORS ARISING FROM SINGLE PRIOR CONVICTION

The defendant claims that the use of a single prior conviction as the basis for two aggravating factors

violates his double jeopardy rights. Therefore, he argues, we should strike at least one of the aggravating factors.

So long as the trial court weighed the aggravating circumstances arising out of the 1968 murder only once, the defendant's rights have not been infringed. *Tittle*, 147 Ariz. at 345, 710 P.2d at 455. Here the trial judge found that the totality of the mitigating circumstances was insufficient to overcome even a single aggravating factor. Hence, it did not matter that the trial court found two aggravating factors arising from his prior conviction since one was enough to impose the death penalty.

FINDING THAT MURDER WAS COMMITTED FOR PECUNIARY GAIN

The defendant claims that the trial court violated his rights when it found that he murdered for pecuniary gain. Former A.R.S. § 13-454(E)(5) (now A.R.S. § 13-703(F)(5)). The defendant contends that the pecuniary gain aggravating factor (1) is unconstitutionally vague, (2) was unconstitutionally applied *ex post facto*, (3) violates double jeopardy, and (4) was not proved beyond a reasonable doubt.

A. *Vagueness*

The defendant argues that the pecuniary gain factor is vague because it fails to distinguish between a killer for hire and a "routine" felony (e.g. burglary or robbery) where a death occurs. Therefore, a person of average intelligence will not understand that his act is a capital crime. *See State v. Bateman*, 113 Ariz. 107, 109, 547 P.2d 6, 8, *cert. denied*, 429 U.S. 864, 97 S.Ct. 170, 50 L.Ed.2d

143 (1976). We have rejected this contention in an earlier case and find no reason to hold otherwise. *State v. Nash*, 143 Ariz. 392, 400, 694 P.2d 222, 230, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985).

B. *Ex Post Facto*

In 1980, this court held for the first time that the pecuniary gain aggravating factor was not limited to contract killers. *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). The defendant argues that application of *Clark* to him constitutes *ex post facto* enlargement of the penalty for murder motivated by pecuniary gain when his offense occurred before the *Clark* decision.

A judicial decision is not subject to the constitutional bar against *ex post facto* legislation. *United States v. Walsh*, 770 F.2d 1490, 1492 (9th Cir.1985). However, a defendant's due process rights are violated when an unforeseeable judicial decision enlarging the scope of a criminal statute is applied retroactively to cover behavior not considered unlawful in the past. *Bouie v. City of Columbia*, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 1702-03, 12 L.Ed.2d 894, 899-900 (1964).

In the present case, the defendant misinterprets *Clark*. That opinion did not hold that former A.R.S. § 13-454(E)(5) excluded non-contract/hired-killer situations prior to *Clark*. *Clark* merely rejected the argument that the factor of pecuniary gain was restricted to "hired guns." The *Clark* opinion did not create substantive law, it merely recognized the pre-existing scope of present law.

It was not an unforeseeable enlargement nor did it suddenly make lawful conduct unlawful. As in *Clark*, finding that the defendant committed this crime for pecuniary gain is not a violation of the defendant's due process rights.

C. *Double Jeopardy*

The defendant also claims violation of his right against double jeopardy. He reasons that use of a general verdict form prevents the court from ascertaining whether the conviction was based on a finding of premeditation or felony murder. The defendant speculates that if premeditation were the basis of the jury's conviction, then the double jeopardy clause would bar pecuniary gain as an aggravating factor since the jury must have "acquitted" him of robbery. Therefore, since it is impossible to determine which type of first degree murder defendant is guilty of, but only that he is guilty of first degree murder, the state failed to prove pecuniary gain beyond a reasonable doubt. *State v. Richmond*, 136 Ariz. 312, 322, 666 P.2d 57, 67, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983); A.R.S. § 13-703(C).

Whether the jury "acquitted" the defendant of robbery is irrelevant. The double jeopardy clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense. *State v. Seats*, 131 Ariz. 89, 638 P.2d 1335 (1981). Pecuniary gain is not the same offense as robbery. *See* A.R.S. § 13-1902. It is an aggravating factor for determining a defendant's sentence in a capital case. In *State v. Carriger*, 143 Ariz. 142,

161, 692 P.2d 991, 1010 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 864 (1985), we stated:

> To prove robbery, the state must show a *taking* of property from the victim, *see* A.R.S. § 13-1902(A); to prove pecuniary gain, the state must show the actor's *motivation* was the expectation of pecuniary gain, *see* A.R.S. § 13-703(F)(5). Proving a taking in a robbery does not necessarily prove the motivation for a murder, and the state cannot be said to be using one fact to prove two different items.

(Emphasis in original.) Even if we were to assume that the jury specifically found that no robbery occurred, double jeopardy does not prevent the trial judge from finding the the defendant's motivation for killing the victim was the expectation of pecuniary gain.

D. *Sufficiency of Evidence*

The defendant finally contends that there was insufficient evidence to show the murder was committed for pecuniary gain. He claims that the only evidence suggesting he killed the victim for pecuniary gain was circumstantial and that the act may well have been an afterthought.

Prior to encountering the victim, the defendant was driving a stolen car. He abandoned that car and took the victim's car. He also left the murder scene with the victim's wallet, money, credit cards and ring. This provides strong circumstantial evidence that the purpose of the murder was pecuniary gain. *Clark*, 126 Ariz. at 436, 616 P.2d at 896. The evidence strongly supports the finding by

the trial judge that the aggravating circumstances of pecuniary gain existed in this case.

MITIGATING FACTORS

The defendant next argues that the trial court erred by failing to consider the defendant's potential for rehabilitation and the circumstances of the Utah murder. A.R.S. § 13-703(E) requires that the trial court "take into account the . . . mitigating circumstances" and then determine whether those circumstances are "sufficiently substantial to call for leniency." Mitigating circumstances include "any factors . . . which are relevant in determining whether to impose a sentence less than death. . . . " A.R.S. § 13-703(G).

Contrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors. We also reject the defendant's claim that the circumstances surrounding his prior murder conviction should be considered as a mitigating circumstance because the victim experienced "a pleasurable erotic experience" before he died. While it is clear that the Utah murder did not display the depravity present in the case at bar, the trial court did not find the circumstances of the earlier murder to be mitigating and neither do we.

As is required at this point, we conduct our own independent examination of the record to determine whether the death penalty is properly imposed. *State v. Vickers*, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981). We note, however, that in 1981 we considered and affirmed

the defendant's death penalty. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982).

Our review of the record satisfies us that the state proved that the defendant committed the murder for pecuniary gain. The state also properly established an additional aggravating circumstance arising out of the defendant's prior murder conviction. Thus, we find, without question, that there were at least two aggravating circumstances in the present case.

We also conclude that the mitigating circumstances are insufficient to outweigh a single aggravating factor. Although the defendant has continued to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to call for leniency. The evidence shows that the defendant strangled to death a 74-year-old man in order to obtain his vehicle and money. At the time the defendant committed this act, he had previously been found criminally responsible for another person's death. The death penalty is appropriate in this case.

VOIR DIRE EXAMINATION OF TRIAL JUDGE

The defendant next contends that lack of an opportunity to examine the trial/sentencing judge for bias and/or prejudice in a capital case violated his rights to due process and a fair trial. The defendant argues that *voir dire* examination of potential jurors is a constitutional requirement of a fair trial and should similarly apply in a capital sentencing case where the trial judge sits as a fact-finder.

We recently addressed this issue in *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988), *reconsideration granted on other grounds*, (July 11, 1989), and rejected the defendant's claim that he had a constitutional right to voir dire the trial judge. We have also previously held that a defendant must raise this issue at trial or it will be waived. *State v. Rossi*, 146 Ariz. 359, 369, 706 P.2d 371, 381 (1985). Here the the [sic] defendant failed to request *voir dire* of the trial court, and never expressly or impliedly alleged bias or prejudice. Therefore, he waived this issue.

CONSTITUTIONAL CHALLENGES[7]

The defendant raises several arguments that the Arizona death penalty is unconstitutional. The defendant first argues that the statutory scheme for capital punishment is unconstitutionally vague because it fails to provide adequate standards for weighing aggravating and mitigating standards. We have previously considered this argument, and we reject it again. *Rossi*, 146 Ariz. at 366, 706 P.2d at 378. The defendant next contends that

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[7] We are aware of the decision of the United States Court of Appeals for the Ninth Circuit in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), *petition for cert. filed*, Mar. 20, 1989, which holds that Arizona's death penalty statute is unconstitutional. The Ninth Circuit opinion invalidates our death penalty scheme on some of the same grounds the defendant raises here. We note that the grounds on which the Ninth Circuit rested its constitutional holdings are grounds on which different courts may reasonably hold differing views of what the Constitution requires. Until the United States Supreme Court instructs us that our interpretations are incorrect, we will continue to apply them.

Arizona's death penalty statute is mandatory and therefore unconstitutional. As we have done before, we reject this argument. *Id.* Finally, the defendant asks us to reconsider the Arizona death penalty on the following five grounds: (1) the death penalty is cruel and unusual punishment; (2) it denies the defendant a right to a jury trial on the issue of sentencing; (3) it allows the prosecutor arbitrary discretion to seek the death penalty; (4) it places the burden of proving mitigating circumstances on the defendant; (5) it is arbitrarily, capriciously and freakishly imposed. There is nothing in the defendant's case causing us to reconsider the death penalty on any of these grounds. We have rejected them before and adhere to that view. *Id.*

PROPORTIONALITY REVIEW

After considering the defendant's claims of error, we make an independent review to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. *Richmond*, 136 Ariz. at 321, 666 P.2d at 66. We compare the defendant and his crime to those cases where the death penalty was properly imposed because the crime was committed in a manner raising it above "the norm" of first degree murders, or the defendant's background places him above "the norm" of first degree murderers. *State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700, *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). We also compare the defendant and his crime to those cases where we have lessened the penalty imposed to life imprisonment. *State v. McCall*, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983), *cert.*

denied, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984).

There are numerous instances where we have upheld the imposition of the death penalty when the murder was committed for pecuniary gain. *State v. LaGrand*, 152 Ariz. 483, 733 P.2d 1066, *cert. denied*, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987); *State v. Harding*, 141 Ariz. 492, 687 P.2d 1247 (1984); *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694, *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982); *State v. Tison*, 129 Ariz. 526, 633 P.2d 335 (1981), *cert. denied*, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982). We have also upheld the death penalty in cases where the defendant had prior convictions punishable by life imprisonment. *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988); *State v. Castaneda*, 150 Ariz. 382, 724 P.2d 1 (1986); *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 898, 88 L.Ed.2d 932 (1986); *State v. Harding*, 141 Ariz. 492, 687 P.2d 1247 (1984).

In contrast, we have reduced a defendant's death penalty sentence to life imprisonment where we have found insufficient evidence to support the aggravating circumstances. *State v. Johnson*, 147 Ariz. 395, 710 P.2d 1050 (1985). We have also reduced the defendant's sentence where the defendant was mentally impaired, *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983), or very young when he committed the crime. *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982).

Nothing in the present case leads us to consider that death is a disproportionate punishment. The defendant does not fall within any of the cases where we have

reduced the death penalty to life imprisonment. We find nothing in the record otherwise making his sentence disproportionate. The defendant does, however, fall within those cases where the death sentence was properly imposed. Thus, the imposition of the death penalty is justified.

We have examined the record for fundamental error and find none. We affirm the judgment of conviction and the sentence.

GORDON, C.J., FELDMAN, V.C.J., and CAMERON and MOELLER, JJ., concur.

(Seal)

SUPREME COURT
STATE OF ARIZONA

April 18, 1990

RE: STATE OF ARIZONA vs. EDWARD HAROLD SCHAD, JR.
Supreme Court No. 4876-3 (CR-85-0246-AP)
Yavapai County No. 8752

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 17, 1990, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Justice Corcoran recused himself and did not participate in the determination of this matter.

Mandate to follow.

NOEL K. DESSAINT, Clerk

TO:

S. Alan Cook, Esq., S. Alan Cook, P.C.
Hon. Robert K. Corbin, Attorney General,
ATTN: Jessica Gifford
Funkhouser, Esq., and R. Wayne Ford, Esq.
Charles R. Hastings, Yavapai County Attorney
Edward Harold Schad, Jr., ASP, Post Office Box B-40496, Florence,
AZ 85232

Supreme Court of the United States

No. 90-5551

Edward Harold Schad, Jr.

Petitioner

v.

Arizona

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Arizona.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

Ocotober [sic] 9, 1990

Justice Souter took no part in the consideration or decision of this petition.

Supreme Court, U.S.
FILED
NOV 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5551

In The

Supreme Court of the United States

October Term, 1990

EDWARD HAROLD SCHAD, JR.,

Petitioner,

v.

ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arizona

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a capital conviction obtained without providing for a unanimous, or even a majority, vote of the jury violates the Sixth, Eighth and Fourteenth Amendments?

2. Whether a state may avoid a capital defendant's exercise of his Eighth and Fourteenth Amendment rights under *Beck v. Alabama* by denying that a necessarily included offense is a "lesser included offense" under state law?

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The opinion of the Supreme Court of Arizona affirming petitioner's conviction and sentence of death is reported in *State v. Schad*, 163 Ariz. 411, 788 P.2d 1162 (1989), and reproduced at J.A. 30-55.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Arizona was entered on December 14, 1989. The motion for reconsideration was denied on April 17, 1990. The Petition in this case was timely filed on August 16, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

The Sixth Amendment, which provides in part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

The Eighth Amendment, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, which provides, in part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves the following state constitutional provision:

Art. 2, §23 of the Arizona Constitution provides in part:

Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict . . .

The following statutory provision is also involved in this case:

Ariz. Rev. Stat. §13-452 (1973). Degrees of murder.

A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree.

STATEMENT OF THE CASE

A. The Offense.

On August 1, 1978, Lorimer Grove left Bisbee, Arizona, on a trip to Everett, Washington. Eight days later, Mr. Grove's body was found by the side of a highway, near Prescott, Arizona. Tr. 2:340; 3:565; Tr. 2:286-287[1]. A rope was tied around his neck. The medical examiner concluded that Mr. Grove had died of ligature strangulation. Tr. 2:361. Nothing else about the circumstances of his death is known.[2]

A few days later, a Ford automobile rented by petitioner eight months earlier in Utah and never returned, was found near the highway, thirty miles north of Flagstaff, Arizona, and 150 miles from where Mr. Grove's body was found. Tr. 3:414-415; 453-454; 5:882, 1032-1033. A homemade mirror device found inside the car was identified at trial as similar to one seen at Mr. Grove's residence. Tr. 3:495; 2:343.

Petitioner was arrested in Utah on September 8, 1978, for possession of a stolen automobile. Tr. 4:625, 626. At

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[1] "Tr." refers to the transcript of the guilt-innocence trial, followed by the volume and page numbers cited. "Tr." preceded by a date refers to transcripts of proceedings other than the guilt-innocence trial, which are identified by date.

[2] During this time, a statewide manhunt was being conducted for the "Tison gang." See *Tison v. Arizona*, 481 U.S. 137, 139-142 (1987); Tr. 3:409; 5:1035. The "Tison gang" escaped from the Arizona State Prison on July 30, 1978, and on August 1, 1978, was believed to be travelling through the area where Mr. Grove's body was found, and where the abandoned Ford was found. Tr. 5:900-901; 913-914.

the time of his arrest, petitioner was driving Mr. Grove's car and had his credit cards. Tr. 4:627-628; 683-685. Petitioner had begun using the credit cards on August 2, 1978. Tr. 5:923, 945.

Shortly after his arrest, petitioner was visited by John Duncan who had arranged with the police to talk to petitioner and to provide them with any information petitioner gave him.[3] Tr. 4:820, 850-851, 853. According to Duncan[4], petitioner said that he would deny being in Arizona, "particularly Tempe, Arizona and Prescott, Arizona." Tr. 4:825. This statement was made without reference to date, context or purpose.

No other evidence incriminated petitioner.

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[3] Duncan first met petitioner the day before he was arrested when petitioner came to his former girlfriend's house where Duncan and his wife were staying. Tr. 4:818, 831. Duncan had fled to Utah from California to avoid going to prison. Tr. 4:831. Duncan had recently been arrested in Utah on a California fugitive warrant. Tr. 4:822. At the time he met petitioner, Duncan was still awaiting extradition to California for probation revocation, fugitive from justice, grand theft auto, burglary and receiving stolen property charges. Tr. 4:829-830. After meeting Schad, Duncan contacted a Utah police officer, Ken Halterman, and told him that petitioner was driving a stolen car. Tr. 4:819. Halterman denied that Duncan was his informant, although Halterman told the Arizona authorities that Duncan was. Tr. 4:646; 5:887. Halterman admitted that he gave Duncan his unlisted home phone number, helped Duncan obtain a reward from Mr. Grove's credit card company, and tried to help Duncan on his California charges by writing a letter to the California authorities. Tr. 4:646-647, 650-651

[4] Although Duncan testified that he immediately told Officer Halterman about this statement, Tr:853, Halterman testified that he knew nothing about any connection between petitioner and Prescott, Arizona until he was contacted by Arizona authorities over a month later. Tr. 4:666.

B. The Trial.

Petitioner was indicted for the murder of Mr. Grove under A.R.S. §13-452. J.A. at 2. That statute defines first degree murder as "[a] murder which is [a] wilful, deliberate or premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate, . . . robbery."

The defense case at trial, like the state's case, was based on inferences drawn from circumstantial evidence. No direct evidence existed that petitioner murdered Mr. Grove. The defense argued that the circumstantial evidence proved only that petitioner was a thief, not a murderer. J.A. at 23.

The prosecutor argued from the same circumstantial evidence that the jury could convict petitioner of either premeditated murder or felony murder. J.A. at 6-7. Pointing to the easel where he had written the three elements of premeditated murder and the two elements of felony murder, the prosecutor explained to the jury the "two types of first degree murder":

> On the left is premeditated murder. There are three elements to that. One, that the defendant caused someone's death. Secondly, that he do [sic] so with malice . . . [a]nd . . . attached to that killing is a third element, that of premeditation which simply means that the defendant contemplated that he would cause death, he reflected upon that.

J.A. at 6. He then discussed the "other type of first degree murder", "what we call felony murder":

> It only has two components [sic] parts. One, that a death be caused, and, two that death be

caused in the course of a felony, in this case a robbery.

Id. The prosecutor then told the jury that "both types of first degree murder apply." J.A. at 7. He argued that the murder was premeditated because the victim was strangled with a rope and that the murder was felony murder because the simple fact that the victim "was found without his car, without his credit card, without the ring, [showed] that he was the victim of a robbery." Tr. 7:1349.

Underscoring the prosecutor's argument, the judge instructed the jury that "[f]irst degree murder is murder which is the result of premeditation" and also is "[m]urder which is committed in the attempt to commit robbery." J.A. at 26. The jury was told that "[a]ll 12 of you must agree whether the verdict is guilty or not guilty." J.A. at 27. The jury was then given three forms of verdict, guilty of first degree murder, guilty of second degree murder and not guilty. J.A. at 27-28. The judge refused defense counsel's request to instruct the jury on the lesser-included offenses of felony murder which were supported by the evidence: robbery and theft. Tr. 7:1343.

The jury returned the verdict finding petitioner guilty of "first degree murder". J.A. at 29. Following the aggravating/mitigation hearing, the trial judge sentenced petitioner to death. Tr. August 29, 1985:10.

C. The Appeal.

In affirming petitioner's conviction and sentence, the Arizona Supreme Court rejected petitioner's constitutional challenges to the single form of verdict and failure

to instruct on the lesser-included offense of felony murder. Noting that petitioner's arguments on the form of verdict issue "have all been previously decided by this Court and rejected", the court stated that the single form of verdict was not error "even though both premeditation and felony murder were . . . submitted to the jury" because there is only one crime of first degree murder in Arizona. J.A. at 41. Acknowledging that the evidence supported a conviction for robbery, the court similarly rejected petitioner's challenge to the failure to instruct on the lesser-included offenses by reiterating its oft-stated rule that "in Arizona there is no lesser-included offenses to felony murder." J.A. at 40.

SUMMARY OF ARGUMENT

This is a capital case. It is a case where this Court has insisted on reliability at all stages of the proceedings. *Beck v. Alabama*, 447 U.S. 625, 638 (1980), *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Of all places, this is where the principle announced in *In re Winship*, that an accused cannot be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the elements of the crime with which he is charged, must be accepted as the essential ingredient of due process. It is also the place where the Sixth Amendment jury trial right demands a fact-finding procedure which produces a reliable verdict of a capital defendant's guilt.

Two long-standing Arizona rules combined to violate petitioner's constitutional right to a reliable verdict. First,

although Arizona purports to require the jury to unanimously agree on the verdict in capital cases, it includes two conceptually and factually different offenses, premeditated murder and felony murder, under the rubric of first degree murder. If a prosecutor seeks conviction based on alternative factual theories, Arizona procedure permits the jury to convict when no more than six jurors are convinced beyond a reasonable doubt as to what it was petitioner did. This result is patently inconsistent with the heightened degree of reliability required by due process and the Sixth Amendment in capital cases and cannot be tolerated where the defendant stands to lose his life.

Next, after depriving petitioner of a unanimous verdict, Arizona law denied him a jury instruction on his sole defense presented at trial. It did so by mandating, without explanation, that there are no lesser-included offenses to felony murder. Thus, notwithstanding that, as the Arizona Supreme Court recognized, the evidence would have supported a conviction for the lesser-included offense of robbery, petitioner's jury was not given that option. The jury's only option was to convict him of some kind of homicide or let him go. That mechanically-applied rule violates the due process principles set forth in *Beck v. Alabama*.

ARGUMENT

I. ARIZONA'S PROCEDURE ALLOWING A JURY TO CONVICT A CAPITAL DEFENDANT WITHOUT AGREEMENT AS TO WHAT THE DEFENDANT DID VIOLATES PETITIONER'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

Arizona, like every other capital punishment state[5], requires a unanimous jury verdict in capital cases. Ariz.

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[5] *Way v. State*, 155 Ala. 52, 46 So.2d 273 (1908); ARK. CONST. Art. II, §10; *Ashby v. State*, 611 S.W.2d 512 (Ark. 1981); Cal. Penal Code §1149 (Deering 1971); Colo.Rev.Stat. §16-10-108 (1986); *State v. Ralls*, 167 Conn. 408, 356 A.2d 147 (1974); DEL. CONST., Art. I, §14; Del.Super.Ct.Crim.R. 31(a); *Fountain v. State*, 275 A.2d 251 (1981); Fla.Crim.R.P. 3.440; *Williams v. State*, 438 So.2d 781 (1983); GA. CONST., Art I, ¶ XI (1989); *Glass v. State*, 250 Ga. 736, 300 S.E.2d 812 (1983); IDAHO CONST. Art. I, §7 (1990); Ill.Rev.Stat. ch.38, §115-4 (1988); *People v. Maxey*, 37 Ill.App.3d 905, 346 N.E.2d 51 (1976); *Jackson v. State*, 490 N.E.2d 1115 (Ind. 1986); Ky.Rev.Stat.Chap. 29A.280 (1988); La.Code Crim.P. Art. 782 (1981); MD. CONST., Art. 21 (1981); *Allew v. State*, 77 Md.App. 537, 551 A.2d 156 (1989); *Markham v. State*, 46 So.2d 88 (Miss. 1950); Mo.Crim.R.P., Rule 29.01 (1990); MONT. CONST. Art. II, §26; Mont.Code Ann. §46-16-603(1)(1989); *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986); Nev.Rev.Stat. §175.481 (1987); *State v. Almy*, 67 N.H. 274, 28 A.2d 372 (1892); *State v. Gadson*, 148 N.J.Super. 457, 372 A.2d 1143 (1977); N.M. CONST. Art. II, §12; Op. Att'y Gen. No. 72-31 (1972); N.C. CONST. Art. I, §24 (1984); *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986); Ohio Criminal Rule 31(A); OKLA. CONST. Art.2, §19 (1981); ORE. CONST. Art. 1, §11 (1989); 42 Pa.C.S.A. R.Crim.P., Rule 1120; S.C. CONST. Art. 5, §22 (1989); S.D.Cod.Laws, Title 23A-26-1(1988); Tenn.R.Crim.P., Rule 21 (1990-91); TEX. CONST. Art. V, §13; Tex.Code Crim.P.Ann. §36.29; UTAH CONST. Art. 1, §10; VA. CONST. Art. 1, §8; WASH. CONST. Art. 1, §22; Amend. 10; *State v. Stephens*, 93 Wash.2d 186, 607 P.2d 304 (1980); 1 Wyom.Stat. §7-11-501 (1987).

Const. art. 2, §23. For petitioner, however, Arizona's rule of jury unanimity became a hollow formalism. Because the prosecutor sought conviction on alternative factual theories of premeditated and felony murder, the jurors were allowed to concur in a verdict finding that petitioner committed "first degree murder" without ever reaching unanimous agreement – or even majority consensus – on the underlying facts constituting the elements of the first-degree offense. This procedure violates petitioner's right to a unanimous jury verdict based on proof beyond a reasonable doubt of every fact necessary to establish the crime for which he was charged; it unconstitutionally erodes the reliability of the verdict on which his death sentence stands.

A. Jury Unanimity Is Constitutionally Required in Capital Cases.

"In [*In re*] *Winship*, [397 U.S. 358, 364 (1970)], this Court stated:

> 'Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charge' *Id.*, at 364 (emphasis added)."

Sandstrom v. Montana, 442 U.S. 510, 520 (1979); see also, *e.g.*, *Francis v. Franklin*, 471 U.S. 307, 313 (1985). "The standard of proof beyond a reasonable doubt, said the Court [in *Winship*], 'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence, to

ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S., at 363." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). "*Winship* expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error'." *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972), quoting *Winship*, 397 U.S. at 363. It was "developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property," *Brinegar v. United States*, 338 U.S. 160, 174 (1949), and is grounded on the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring.)

By reducing the risk of factual error in the conviction, the reasonable doubt standard not only promotes reliability of the jury verdict, but also ensures community confidence in the criminal justice system. "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*, 397 U.S. at 364. This is another reason why "the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt,'" *Taylor v. Kentucky*, 436 U.S. 478, 485-86 (1978), quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

Historically as well as logically, there is a close connection between the beyond-a-reasonable-doubt standard and the rule requiring jury unanimity in criminal cases. Although arising from other wellsprings prior to its full

emergence in the Fourteenth Century,[6] the unanimity requirement subsequently came to be identified as a guarantee of the standard of certainty expressed in the beyond-a-reasonable-doubt formulation. For example, in Sir Matthew Hale's HISTORY OF THE COMMON LAW OF ENGLAND, published posthumously in 1713 before the beyond-a-reasonable-doubt standard was firmly established, Hale defended the "excellent Order of Trial by Jury, which is far beyond the Trial by Witnesses according to the Proceedings of the Civil Law" because "it has all the Helps to investigate the Truth that the Civil Law has, and many more. For as to Certainty, ... It has the unanimous Suffrage and Opinion of Twelve Men, which carries in itself a much greater weight and Preponderance to discover the Truth of a Fact, than any other Trial whatsoever." *Id.*, at 166-67 (1971). Writing two centuries later, after the beyond-a-reasonable-doubt rule had become axiomatic,[7] Sir James Fitzjames Stephen described the relationship more directly:

> The justification of the [unanimity] rule, now that the character of the jury has changed from that of witnesses to that of judges of fact, seems to be that it is a direct consequence of the principle that no one is to be convicted of a crime unless his guilt is proved beyond all reasonable doubt. How can it be alleged that this

[6] See II POLLOCK (SIR FREDERICK) & MAITLAND (FREDERIC W.), THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed., Cambridge University Press, reissued & reprinted 1984).

[7] The reasonable-doubt rule "seems to have had its origin no earlier than the end of the 1700's and to have been applied at first only in capital cases." 9 WIGMORE (JOHN HENRY) 405 [2497] (Chadbourn re. 1981).

> condition has been fulfilled so long as some of the judges by whom the matter is to be determined do in fact doubt? . . . My own opinion is that trial by jury has both merits and defects, but that the unanimity required of the jurors is essential to it. If that is to be given up, the institution itself should be abolished. There is a definite meaning in the rule that criminal trials are to be decided by evidence plain enough to satisfy in one direction or the other a certain number of representatives of the average intelligence and experience of the community at large, but if some of the members of such a group are of one opinion and some of another, the result seems to be that the process has proved abortive and ought to be repeated.

I STEPHEN (SIR JAMES FITZJAMES), A HISTORY OF THE CRIMINAL LAW OF ENGLAND 304-05 (1883).

To be sure, this Court has held that jury unanimity is not indispensable to the constitutionality of every criminal verdict. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Like the exact size of the jury, the unanimity requirement and other related rules are amenable to modification that do not subvert the essential functions of the right to jury trial. See *Williams v. Florida*, 399 U.S. 78 (1970). But the Court has steadfastly insisted that those functions include "assur[ing] the reliability of . . . [the jury's] verdict" and " 'the very integrity of the fact-finding process,' " *Brown v. Louisiana*, 447 U.S. 323, 334 (1980), quoting *Linkletter v. Walker*, 381 U.S. 618, 639 (1965), by subjecting the evidence of guilt to "evaluation by the sense of the community," *Ballew v. Georgia*, 435 U.S. 237, 238 (1978). So, where reductions in the size of the jury, in the proportion of jurors required to vote to convict, or in both result in a

leaching away of sufficient confidence in the jury's verdict as a reliable determination of the facts on which severe criminal penalties depend, the Fourteenth Amendment Due Process line is reached. *Johnson v. Louisiana*, 406 U.S. at 362 (White, J., concurring ["substantial majority of the jury" required to vote to convict]); *id.*, at 366 (Blackmun, J., concurring ["a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty"]); *Ballew v. Georgia, supra* (jury of five is too small); *Burch v. Louisiana*, 441 U.S. 130 (1979) (nonunanimous jury of six is too few). As the Court later observed in *Brown v. Louisiana*, "a line must be drawn somewhere, . . . the constitutional inviolability of that line must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired," 447 U.S. at 331, and in drawing the line, this Court has given prominent recognition to the concern that decreasing the number of jurors needed to vote for conviction on a particular finding of fact "leads to less accurate factfinding and a greater risk of convicting an innocent person," *id.*, at 332.

It is against this background that we come to the question of the constitutionality of a state practice which allows a capital conviction and a death sentence to rest upon two alternative factual findings neither of which has to have obtained the assent of more than 6 out of the 12 members of the jury. Everything this Court has written on the subject of criminal jury trials *or* the subject of the death penalty points to a single answer to that question. Reductions in the number of jurors who have to vote for conviction have never been approved in a capital case; to the contrary, the Court has taken care to distinguish the cases at issue as noncapital. *Williams v. Florida*, 399 U.S. at

103 ("In capital cases, . . . it appears that no State provides for less than 12 jurors – a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty."); *Johnson v. Louisiana, supra* (state constitutional provision required unanimous jury verdict in capital case); *Apodaca v. Oregon, supra* (same). See also *Burch v. Louisiana*, 441 U.S. at 136. This is in keeping with the Court's consistent recognition that in capital cases both the guilt and penalty determinations must be structured to assure heightened reliability, not to permit findings whose reliability is diminished. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). To ensure the requisite degree of reliability, this Court has required additional safeguards not present in noncapital cases. *Booth v. Maryland*, 482 U.S. 496, 509 n.12 (1987); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights"); *id.* at 77 (Harlan, J., concurring).

This Court has also accepted without question that the degree of confidence that society should have in the correctness of factual conclusions stands in direct relation to the potential harm caused by an incorrect factual determination. *E.g., Bell v. Burson*, 402 U.S. 535, 540 (1971); *Winship*, 397 U.S. at 371-374 (Harlan, J., concurring). Jury

unanimity ensures the protection of the reliability concerns which are paramount in capital cases.[8] It requires the state to prove the facts on which a defendant is convicted beyond a reasonable doubt to the minds of all the jurors. The reasonable doubt standard embodied in the due process clause and effectuated by jury unanimity, thus, "serves to allocate the risk of error . . . and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). Jury unanimity also inspires community confidence that a guilty verdict in the most serious of crimes will not be reached without overcoming the reasonable doubts of all the jurors. In short, jury unanimity:

> is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community.

McKoy v. North Carolina, 110 S.Ct. 1227, 1238 (1990) (Kennedy, J., concurring).

This Court should now say what it has implied but left unsaid in an unbroken string of cases, and what every capital punishment state has recognized: jury unanimity in capital cases is essential to our notions of reliability, accuracy and community faith in jury verdicts embodied

[8] Empirical research demonstrates that jury unanimity produces more thorough deliberations with more participation by minority viewpoints. Hastie, R., Penrod, S., and Pennington, N., *Inside the Jury*, 238 (1983); Hans, V.P., and Vidmar, N. *Judging the Jury*, 171-175 (1986).

in the due process clause and Sixth Amendment right to jury trial.[9]

B. This Is Not a Unanimous Verdict.

The verdict in this case cannot be squared with the constitutional requirement of jury unanimity in guilt/innocence determinations in capital cases. That requirement includes the unanimous agreement of the jurors upon some version of the facts which comprises every element of the capital offense. "The unanimity rule . . . requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged." *United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977).[10] "Unanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense." *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983). See also *United States v. Beros*, 833 F.2d 455, 461 (3rd Cir. 1987).

In petitioner's case, no such agreement was demanded. Instead, the prosecutor was permitted to

[9] Even if jury unanimity in a capital case is not a federal constitutional right, this same result should obtain. Once a given rule has weaved its way into the system through which criminal justice is administered, it cannot be ignored by a state. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14.

[10] Gipson was a federal noncapital case where the federal unanimity requirement applies *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972).

obtain a conviction by persuading half the jury of each of two independent, alternative factual scenarios. The prosecutor's closing argument was a classic instance of attempted persuasion by simplification. It presented two distinct theories of first-degree murder, each resting on a single salient fact declared to be self-evident. The two theories might have been drawn from the same or from wholly different chains of events.

The prosecutor graphed them for the jury on an easel, setting out the "two ways for first degree murder to be committed." J.A. at 6. The first was "premeditated murder," which had "three elements" including "premeditation, which simply means that the defendant contemplated that he would cause death." *Id*. The "other type of first degree murder is what we call felony murder," having "only . . . two component parts". *Id*.

"In this case," the prosecutor argued, "both types of first-degree murder apply." J.A. at 7. The argument for premeditated murder was based exclusively on a discrete factual proposition: that Mr. Grove was strangled with a thin rope and "strangling the . . . life out of someone with a rope is probably one of the best examples we can think of of premeditation." Tr. 7:1349. The argument for felony murder was based exclusively on a different factual proposition: that petitioner's connection with the murder was proved by his possession of Mr. Grove's personal effects – car, credit cards, etc.; *ergo* Mr. Grove "was the victim of a robbery." *Id*. Both of these independent factual propositions were refined to a filament of logic. Alternative possible factual scenarios, such as an accidental killing by strangulation in the course of a medically recognized form of deviant sex play (which would be second degree

murder in Arizona) or a malicious, but undeliberated, murder followed by the formation and action upon an intent to steal the victim's personal effects (also second degree murder) were ignored as insufficiently elegant. Because of either of two independent facts – strangulation and Petitioner's possession of Mr. Grove's effects – the prosecutor argued that "in this case there really is no question that a first degree murder was committed, and I won't discuss that any further with you." Tr. 7:1349. See also J.A. at 6-7, turning the rest of the summation to "what the issue in this case is" – "the defense . . . that maybe somebody else did it."

The constitutional trouble, however, is that under Arizona procedure the prosecutor needed to convince no more than six jurors of either of the two alternative factual propositions on which petitioner's conviction and death sentence depend. If six jurors accepted and six rejected the use-of-a-rope-as-premeditation-*per-se* logic and six accepted while six rejected the possession-of-recently-stolen-personal-property logic, the cumulation of two less than majority votes by the jury would require a conviction despite the lack of any basis for confidence that even one more juror believed than disbelieved a set of facts necessary to establish petitioner's guilt of first degree murder.

This lack of factual agreement by the jury defeats the very purpose of the constitutional right to jury trial. Without some assurance that there has been a group deliberation resulting in a consensus about those facts the state has proven beyond a reasonable doubt which satisfy the statutory definition of the elements of the crime charged, the reliability requirement of due process and

the Sixth Amendment cannot be satisfied. Here, no such assurance was provided. In essence, the jury was allowed to convict petitioner of capital murder on no more than a general agreement that he was a criminal. This is constitutionally impermissible in any case. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (statute criminalizing being a "gangster" violates due process). In a capital case, it is unconscionable.

II. ARIZONA'S PROCEDURE VIOLATED THE CLEAR MANDATE OF *BECK V. ALABAMA* BY DENYING PETITIONER'S JURY THE OPTION OF CONVICTING HIM ON A NECESSARILY LESSER-INCLUDED OFFENSE.

While the State took advantage of the absence of direct evidence at petitioner's trial by presenting alternative theories of guilt without requiring the jury to endorse either theory, it cut off petitioner's opportunity to use a similar approach in his defense. The trial evidence supported the inference that petitioner was not guilty of felony murder but guilty of the lesser-included offenses of robbery or theft. Petitioner could not present those alternative inferences, however, because the court did not instruct the jury on robbery or theft. This error alone would require reversal of petitioner's capital conviction on due process grounds. The absence of lesser-included instructions together with the use of the procedures that lessened the State's burden of proving either of its alternative theories stacked the deck entirely in favor of the state, unconstitutionally undermining the reliability of the verdict.

A. The Pertinent Evidence.

The only substantial evidence against Petitioner in this case was his possession of the victim's property. This evidence did not implicate petitioner directly in the homicide. Petitioner could have found Mr. Grove alive by the side of the road and forcibly taken his car and credit cards from him. This would have made petitioner guilty of robbery but not homicide. Or petitioner could have come across Mr. Grove's dead body, or found his car unattended, and taken his car and credit cards. This would have made him guilty of theft, but not robbery or homicide. Petitioner's defense at trial was that the evidence at most established that petitioner had stolen Mr. Grove's property. J.A. at 23.

B. The Pertinent Criminal Statutes.

The pertinent Arizona statute defining felony murder reads, in pertinent part, as follows:

> A murder which is . . . committed in . . . the perpetration of . . . robbery . . . is murder of the first degree.

A.R.S. §13-452. Petitioner argued before the Arizona courts that he had a due process right, under *Beck v. Alabama*, 447 U.S. 625 (1980), to jury instructions that would have permitted a conviction for robbery or theft as an alternative to a felony murder conviction. Theft is a lesser-included offense of robbery under Arizona law. *State v. Celaya*, 135 Ariz. 248, 251-52, 660 P.2d 849, 852-53 (1983).

C. The Trial Court's Charge.

The trial court refused to instruct on robbery, or on theft. J.A. at 5; Tr. 7:1343. In essence, this ruling revoked petitioner's sole defense of guilt on a crime less than capital murder and forced him to argue that, of the two choices available to the jury, guilty of murder or not guilty, they should find the latter.

D. The Arizona Supreme Court's Decision.

The Arizona Supreme Court recognized that the evidence would have supported a conviction for robbery. J.A. at 40. The same evidence necessarily would also have supported a theft conviction under Arizona law. *Celaya, supra*. The Arizona Supreme Court nevertheless rejected petitioner's contention by asserting the oft-repeated "rule" that "in Arizona there is no lesser-included offense to felony murder." *Id*.

The court cited three cases in support of this "no lessers" rule. Two of these cases *State v. LaGrand*, 153 Ariz. 21, 734 P.2d 563, *cert. denied* 484 U.S. 872 (1987) , and *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied* 474 U.S. 975 (1985), held that felony murder has no lesser-included offenses because the underlying felony supplies the *mens rea* necessary to satisfy the premeditation element of first degree murder. This is a *non sequitur*. It offers no explanation for why the underlying felony is not a lesser-included offense when there is a factual dispute regarding whether the defendant caused a death in

the course of committing the felony.[11] The third case cited, *State v. Leslie*, 147 Ariz. 38, 48, 708 P.2d 719, 729 (1985), held in a single sentence that burglary is not a lesser-included offense of felony murder, citing this Court's decision in *United States v. Garrett*, 471 U.S. 773 (1985). *Garrett*, which held that drug importation and "continuing criminal enterprise" are not the same crime for double jeopardy purposes, obviously lends no support to the rule. See *State v. Leslie*, 147 Ariz. at 50-51, 708 P.2d at 731-732 (Feldman, J., specially concurring) (*Gipson* "unrelated to the *Beck* principle"; because evidence would support verdict for underlying felony but not felony murder, underlying felony instruction should have been given).

E. The Command of Due Process.

In a capital case, due process requires a State to permit the jury to consider a verdict of guilt of a lesser included non-capital offense, when the evidence would have supported such a verdict. *Beck v. Alabama*, 447 U.S. 625 (1980). The "unavailability of a lesser included

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[11] As between felony murder and robbery, the only disputed issue of fact was whether petitioner killed the victim. As between robbery and theft, the only disputed issue of fact was whether petitioner forcibly took the victim's property. Where "the charged greater offense requires the jury to find a disputed *factual element* which is not required for conviction of the lesser-included offense," the jury must have the option of convicting defendant on that lesser offense. *State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980), quoting *Sansone v. United States*, 380 U.S. 343, 350 (1965).

instruction enhances the risk of an unwarranted conviction" and "diminish[es] the reliability of the guilt determination" which "cannot be tolerated in a case in which the defendant's life is at stake." *Id.*, 447 U.S. at 637-638. The goal of the *Beck* rule [thus] . . . is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984); see also *Hopper v. Evans*, 456 U.S. 605, 610 (1982) (*Beck* requires jury instruction on lesser included offense where evidence warrants instruction and, without instruction on lesser, "a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious crime.").

Beck and *Spaziano* prohibited states from enforcing rules of law that diminished the rationality and reliability of capital verdicts by barring "third option" jury instructions. *Beck*, 447 U.S. at 637; *Spaziano*, 468 U.S. at 456. The Arizona "no lessers" rule arbitrarily diminishes the reliability of the result in precisely the same fashion as the practices at issue in *Beck* and *Spaziano*:

a. In *Beck*, this Court began its analysis by explaining that under Alabama law, the capital offense of "robbery . . . when the victim is intentionally killed by the defendant" was established by felony murder plus proof of intent to kill. Thus "[f]elony murder is . . . a lesser included offense of the capital crime of robbery-intentional killing." An Alabama statute prohibited instructions on lesser-included offenses in capital cases. But the Court held that the application of the Alabama statute violated due process.

b. In *Spaziano*, this Court held that the defendant was not entitled to the benefit of both a lesser-included offense instruction and an expired period of limitations on the lesser offenses. *Spaziano*, 468 U.S. at 454. Seven members of the Court agreed that the Constitution required the state to give the defendant the option of waiving the state-law statute of limitations, so that the jury could be instructed on the lesser-included offenses. *See id.* at 456-57; *id.* at 490 (Stevens, J., concurring in part and dissenting in part); *id.* at 467 (White, J., concurring in part and concurring in the judgment).

Here, as in *Beck* and *Spaziano*, the evidence would have permitted the jury to find that petitioner had committed a violent lesser-included felony, but not a capital murder. As the Arizona Supreme Court recognized, the jury rationally could have found that petitioner robbed Mr. Grove but that the State had not proved the additional element – death in the course of the felony – necessary for felony murder. J.A. at 40. This state of facts would have entitled petitioner to a robbery instruction (and in turn to a theft instruction) under all of the ordinary rules of lesser-included offense instructions accepted in Arizona, see *State v. Celaya, supra*, 660 P.2d at 852, and elsewhere, see *Schmuck v. United States*, 109 S.Ct. 1443, 1450 (1989), *except for* a wholly arbitrary unexplained *ipse dixit* pronouncement by the state Supreme Court saying simply "felony murder has no lessers." There is no greater justification for subordinating the demands of due process as perceived in *Beck* to such a state-law fiat than there was in *Beck* itself or in *Spaziano*.

Petitioner's due process rights have been violated whether or not robbery is technically a "lesser-included

offense" of felony murder under Arizona law. State courts are the ultimate arbiters of the meaning of state law, but that does not license them to manipulate it so as to defeat federal constitutional commands. *Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979); *McKoy v. North Carolina*, 109 S.Ct. 1227, 1232 (1990). The principle of *Beck* does not depend on technicalities of state law. *Beck* instead teaches that technical state rules governing instructions on lesser-included offenses must give way to the due process demand for enhanced reliability and rationality in capital verdicts.

In the analogous context of double jeopardy limits on successive prosecutions, this Court held without dissent that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. *Harris v. Oklahoma*, 433 U.S. 682 (1977). Under the Oklahoma felony murder statute, as under Arizona law in petitioner's case, the State necessarily had to prove all of the elements of robbery in the felony murder prosecution. Under these circumstances, the Court "treated a killing in the course of a robbery as a separate offense, and the robbery as a species of lesser included offense." *Illinois v. Vitale*, 447 U.S. 410, 420 (1980). See also *Payne v. Virginia*, 468 U.S. 1062 (1984) (per curiam). In precisely the same way, the robbery in this case is "a species of lesser included offense" for purposes of due process. That analysis is necessary here to vindicate *Beck*'s concern for reliability of results in capital cases.

The jury in petitioner's case was denied the "third option" of convicting petitioner of an offense, supported by the evidence, which lies between a capital conviction

for felony murder and an acquittal. No valid reason exists for denying the jury this option. Its forced choice on a capital charge cannot be squared with the due process principles enunciated by this Court in *Beck*.

CONCLUSION

These two constitutional violations, mechanically applied under Arizona law, exacerbate each other. The state in petitioner's case was not only relieved of the burden of obtaining a unanimous verdict; but the jury was allowed no other option than to find petitioner guilty of some kind of homicide or acquit him. The procedures used to secure petitioner's conviction, upon which his death sentence is based, in no way meet the standards of reliability demanded by this Court in capital cases. The Judgment of the Arizona Supreme Court should be reversed.

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OCTOBER TERM, 1990

EDWARD HAROLD SCHAD, JR., PETITIONER

v.

STATE OF ARIZONA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The United States will address the following question:

Whether the reasonable doubt standard required that the jury agree on the type of first degree murder that petitioner committed.

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§ 13-452 (1959 & Supp. 1973) 3, 6
§ 13-1105 (1989) 16
§ 13-1105.A (1989) 3
Fed. R. Crim. P. 31(a) 15

Miscellaneous:

Truitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues*, 36 Okla. L. Rev. 473 (1983) 18
1 C. Wright, *Federal Practice and Procedure* (2d ed. 1982) 8

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-5551

EDWARD HAROLD SCHAD, JR., PETITIONER

v.

STATE OF ARIZONA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether, when a criminal statute provides alternative means of committing an offense, the jury must unanimously agree on the means used by the defendant before it can convict. A number of federal criminal statutes set forth alternative ways of committing a particular offense. In fact, the federal first degree murder statute, like the Arizona statute at issue in this case, defines first degree murder to include both premeditated homicide and homicide committed in the perpetration of certain felonies. 18 U.S.C. 1111. The Court's disposition of the first question presented will therefore affect federal cases arising under Section 1111 as well as other statutes that provide more than one way of committing an offense.

STATEMENT

1. On August 1, 1978, Lorimer "Leroy" Grove, a 74-year-old man, left his home in Bisbee, Arizona, to visit his sister in Washington State. He was driving his new Cadillac automobile and towing a camper. J.A. 30; *State* v. *Schad,* 129 Ariz. 557, 561, 633 P.2d 366, 370 (1981), cert. denied, 455 U.S. 983 (1982). On August 9, 1978, Grove's badly decomposed corpse was found in underbrush off U.S. Highway 89, about nine miles south of Prescott, Arizona. When his body was discovered, there was a rope around his neck; it was determined that he had died by strangulation. J.A. 30-31; *State* v. *Schad,* 129 Ariz. at 561, 633 P.2d at 370.

Two days after Grove left on his trip, Arizona police discovered, also off Highway 89, a rental car that petitioner had rented for a weekend in December 1977 and never returned. The car contained several items that were later identified as belonging to Grove, including one that Grove had probably taken on his trip, a mirror device that he used for coupling his camper to his car. J.A. 31; *State* v. *Schad,* 129 Ariz. at 561, 633 P.2d at 370.

The following month, petitioner was stopped in New York for speeding. He was driving Grove's Cadillac when he was stopped. He told the New York State police officers that he had no proof of registration for the car because the car belonged to an elderly friend named Larry Grove. J.A. 31; *State* v. *Schad,* 129 Ariz. at 561, 633 P.2d at 370.

Petitioner was later arrested in Utah for parole violation; at the time of his arrest, he was still in possession of Grove's Cadillac. A search of the car revealed personal belongings of Grove's, and a search of petitioner's wallet yielded two credit cards in Grove's name, which petitioner had begun using on August 2, 1978, the day after Grove

left on his trip, and the day before petitioner's abandoned rental car was found near the same Arizona highway where Grove's body was later discovered. J.A. 31; *State* v. *Schad,* 129 Ariz. at 561, 633 P.2d at 370; Pet. Br. 4. While in custody, petitioner told an associate that he would "deny being in any area of Arizona, * * * particularly Tempe, Arizona, and Prescott, Arizona." J.A. 33.

Petitioner gave several conflicting accounts of how he came into possession of Grove's car and personal belongings. In testimony at his first trial, petitioner admitted that all his prior accounts were false. He then testified that he obtained Grove's car at a truck stop in Phoenix, Arizona, where he got it by trading the rental car that he had stolen to a couple from France. Efforts by Arizona officials to confirm the existence of the French couple proved unsuccessful. *State* v. *Schad,* 129 Ariz. at 570-571, 633 P.2d at 379-380.

2. Petitioner was indicted on one count of first degree murder. The Arizona statute applicable to petitioner's case defined first degree murder as "murder which is willful, deliberate, or premeditated killing, or which is committed * * * in the perpetration of, or attempt to perpetrate, * * * robbery." Ariz. Rev. Stat. Ann. § 13-452 (1959 & Supp. 1973).[1]

3. Petitioner was convicted and sentenced to death. His conviction was affirmed on direct review, *State* v. *Schad,* 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983 (1982), but it was set aside on collateral attack because the trial court failed to instruct the jury on the elements of the felonies underlying the State's felony-

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[1] The Arizona statutes defining and punishing murder were revised in 1978, but the first degree murder statute still reaches both premeditated murder and felony murder. See Ariz. Rev. Stat. Ann. § 13-1105.A (1989).

murder theory (robbery and kidnapping). *Schad* v. *State*, 142 Ariz. 619, 691 P.2d 710 (1984).

4. Petitioner was retried and again convicted of first degree murder and sentenced to death. The Arizona Supreme Court affirmed his conviction and sentence. J.A. 30-55.

a. At the second trial, the court instructed the jury that "[f]irst degree murder is murder which is the result of premeditation" and that "[m]urder which is committed in the attempt to commit robbery is also first degree murder." J.A. 26. The court further instructed that the jury's verdict must be unanimous: "All 12 of you must agree whether the verdict is guilty or not guilty." J.A. 27. Petitioner did not request, and the judge did not give, an instruction that the jury had to agree on the type of first degree murder – premeditated murder or felony murder – that petitioner committed.

b. In affirming petitioner's conviction, the Arizona Supreme Court rejected petitioner's argument that jury unanimity was required with respect to the type of first degree murder that petitioner committed. The court explained:

> In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. Although a defendant is entitled to a unanimous verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

J.A. 41 (quoting *State* v. *Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982) (citations omitted)).

SUMMARY OF ARGUMENT

The Due Process Clauses of the Fifth and Fourteenth Amendments require proof beyond a reasonable doubt of each fact "necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The facts necessary to constitute a crime are those set forth as essential elements of proof in the statute that defines the crime. Arizona's first degree murder statute permits the offense to be established through proof that the defendant caused death in one of several ways, including either with premeditation or in the course of a robbery. Although the jurors were not told that they had to be unanimous as to the particular way petitioner committed the offense, petitioner's conviction satisfied the requirements of due process because each juror found every element necessary to establish the crime of first degree murder. That is, all 12 jurors found beyond a reasonable doubt that the victim's death occurred either as a result of premeditated homicide or in the course of the commission of a robbery, which is precisely what the Arizona offense of first degree murder requires.

Petitioner argues that premeditated murder and felony murder must be seen as "conceptually distinct" offenses. Where a statute contains such distinct offenses, he argues, the jury may not properly convict unless all 12 jurors agree that the defendant committed premeditated murder or all 12 agree he committed felony murder.

That argument is seriously flawed. Under Arizona law, premeditated murder and felony murder are considered alternative means of committing a single offense, and there is no constitutional ground for challenging that characterization. While the Due Process Clause requires that the jurors find all the elements of the offense to be proved beyond a reasonable doubt, there is no due process princi-

ple that requires the jurors to agree on a single theory of liability. As long as the jurors agreed, beyond a reasonable doubt, that petitioner engaged in conduct that the Arizona legislature characterized as first degree murder, nothing in the Constitution bars his conviction of that crime, even though the jurors may have followed different routes to reach their verdict.

ARGUMENT

PETITIONER'S CONVICTION SATISFIED DUE PROCESS BECAUSE THE JURY AGREED THAT ALL THE ELEMENTS OF FIRST DEGREE MURDER WERE PROVED BEYOND A REASONABLE DOUBT

Petitioner contends (Pet. Br. 14-20) that to convict him of first degree murder the jurors were required to agree on which type of first degree murder he committed—premeditated murder or felony murder. In our view, the Constitution imposes no such requirement.[2]

1. In Arizona, as in every other State and in the federal system, first degree murder is defined by statute. Arizona's first degree murder statute, Ariz. Rev. Stat. Ann. § 13-452 (1959 & Supp. 1973), defines a single offense that may be committed in a number of ways. In that respect, Arizona's statute resembles those of other States and the federal government. See *Tison* v. *Arizona*, 481 U.S. 137, 151-155 (1987) (surveying state statutes); 18 U.S.C. 1111; see also *Whalen* v. *United States*, 445 U.S. 684, 711 n.6 (1980) (Rehnquist, J., dissenting) (statute enacted by Congress for the District of Columbia "defines only one offense, murder in the first degree, which can be committed in any number of ways").

[2] We will not address petitioner's contention (Pet. Br. 10-14) that under the Sixth Amendment, as that provision applies to the States through the Fourteenth Amendment, jury unanimity is required in state criminal trials for capital offenses. For the sake of simplicity, references to jury agreement or unanimity hereafter will refer to agreement or unanimity by the requisite proportion of the jury.

The ways that first degree murder can be committed under the Arizona statute include causing death by premeditated killing and committing certain felonies that result in death. As construed by the Arizona Supreme Court, first degree murder is "only one crime," regardless of which of the several means of committing the offense the defendant has employed in a particular case. J.A. 41; *State* v. *Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982); *State* v. *Axley*, 132 Ariz. 383, 646 P.2d 268 (1982).

There is no basis for any constitutional objection to Arizona's decision to treat premeditated murder and felony murder as different means of committing the same offense. Arizona's first degree murder statute embodies a legislative judgment that a murder committed with the purpose of causing death and a murder committed while carrying out the intent to rob are legally and morally equivalent.[3] That judgment has deep roots in legal tradition:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the vic-

[3] See *State* v. *Serna*, 69 Ariz. 181, 188, 211 P.2d 455, 459 (1949):

> The attempt to perpetrate the crime of robbery * * * during which a homicide is committed, takes the place of and amounts to the legal equivalent of such deliberation, premeditation, and design, which were otherwise necessary attributes of murder in the first degree.

> tim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified [such] behavior * * * along with intentional murders.

Tison v. *Arizona*, 481 U.S. at 157.

Due process principles require the jury to find all the elements of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). But because there is no constitutional bar to making premeditated murder and felony murder alternative means of committing first degree murder, due process did not require the jurors in this case to agree on whether petitioner committed the crime of first degree murder by premeditation or by participating in the robbery that resulted in Grove's death. It was enough that the jurors agreed that petitioner committed the crime of first degree murder, as defined in the statute. By agreeing on that point, the jurors unanimously found beyond a reasonable doubt every fact necessary to convict petitioner of the crime with which he was charged.

2. The rule against duplicity bars the joining of two or more separate offenses in a single count of an indictment or information. See 1 C. Wright, *Federal Practice and Procedure* § 142 (2d ed. 1982). The rule is designed in part to guard against the risk "that a jury may find the defendant guilty on a count without having reached a unanimous verdict on the commission of a particular offense." *United States* v. *UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); see also *Russell* v. *United States*, 369 U.S. 749 (1962); *United States* v. *Zeidman*, 540 F.2d 314, 317 (7th Cir. 1976). The predicate for applying the rule against duplicity – a finding that the two allegations in a single count constitute separate offenses –

presents a question of statutory interpretation. See *UCO Oil*, 546 F.2d at 836-838; *Zeidman*, 540 F.2d at 317.[4] As explained above, the Arizona Supreme Court has decided that question: petitioner's conviction was based on a count that charged a single offense. That determination forecloses petitioner's challenge to the verdict on the ground that the jury may not have agreed on the elements of the crime charged:

> Once it is determined that the statute defines but a single offense, it becomes proper to charge the different means, denounced disjunctively in the statute, conjunctively in each count of the indictment. It is not a valid objection * * * that the jury, in arriving at a unanimous verdict, may not agree on the means by which the offense was committed.

UCO Oil, 546 F.2d at 838.

3. Petitioner does not dispute that he was charged with, and convicted of, a single offense, nor does he dispute that each juror found beyond a reasonable doubt that he committed that offense. Instead, he contends (Pet. Br. 17) that, even with respect to a single offense, the Due Process Clause requires "the unanimous agreement of the jurors upon some version of the facts which comprises every element of the * * * offense."

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[4] The same is true of the analogous question whether a defendant has improperly suffered multiple punishments under a multiplicitous indictment. *Bell* v. *United States*, 349 U.S. 81 (1955); see also *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1978) ("allowable unit of prosecution" for purposes of determining "scope of protection afforded by a prior conviction or acquittal" under Double Jeopardy Clause "depends on * * * congressional choice"); *Whalen* v. *United States*, 445 U.S. 684, 688-690 (1980) (in rejecting Double Jeopardy Clause challenge to consecutive sentences for rape and rape-felony murder in single proceeding under D.C. statute, congressional intent was "dispositive").

Under petitioner's theory, there is no logical stopping point to the insistence on jury agreement. That is clear from petitioner's assertion (Pet. Br. 18) that the jury must unanimously reject every "possible factual scenario" suggested by the evidence in a particular case. Thus, under petitioner's theory, the jury apparently must be unanimous not only as to the means by which the statutory offense was committed, but even as to the details of the crime. Such a requirement, however, would not promote the interests served by the reasonable-doubt standard. Focusing as it does on the means of committing the crime rather than on whether the crime was committed, petitioner's approach would not reduce the risk of an erroneous conviction. See *In re Winship*, 397 U.S. at 363. Nor is petitioner's approach necessary to assure the community that innocent persons are not being condemned. *Id.* at 364. As long as the jury is required to find, beyond a reasonable doubt, that the defendant committed the crime charged, there can be no legitimate complaint that public confidence in the verdict is eroded by the jury's possible lack of agreement on the theory of liability or certain details of the crime. Rather, the effect of adopting petitioner's requirement of unanimity on legal theory and "factual scenario" would be to risk the unwarranted discharge of a defendant where the jury was confident and unanimous that he had committed the crime, but divided or uncertain as to exactly how he did it.

This point can be illustrated by the following hypothetical case. Suppose a state statute makes it unlawful to commit murder by drowning, strangulation, or poisoning, and the defendant seeks to kill his victim by all three methods. Suppose further that the evidence is clear that the defendant committed the murder, but unclear as to which of the defendant's efforts actually caused the victim's death. In that setting, it would be senseless to insist that the jury

be unanimous as to whether the victim died of drowning, strangulation, or poisoning before the jury could convict the defendant of a crime that all 12 jurors were firmly convinced he committed.

The same analysis applies here. The policies of the Due Process Clause, as embodied in the reasonable-doubt standard, are fully served as long as the jurors agree that the evidence has established the defendant's guilt of the offense defined by the legislature; it is immaterial that the jurors may follow different routes to reach that conclusion, as long as they all reach the same end.

Whatever appeal there may be to petitioner's proposed rule may stem from a sense of concern about a verdict that is based on differing views by the jurors of different features of the case; the notion may be that if the jurors cannot reach consensus as to the theory of liability or the details of the case, perhaps there is something doubtful about their announced consensus as to the result.[5] As the example above shows, however, there are many instances in which jurors may take different views of the evidence, or even adopt different permissible theories of liability, without having any lack of confidence on the ultimate

[5] We take this to be the point of petitioner's argument (Pet. Br. 19) that if six jurors accepted the premeditation theory and six accepted the felony-murder theory, "the cumulation of two less than majority votes by the jury would require a conviction despite the lack of any basis for confidence that even one more juror believed than disbelieved a set of facts necessary to establish petitioner's guilt of first degree murder." This argument, however, is beside the point. It does not matter that half the jurors may have endorsed one theory of liability while the other half endorsed another, any more than it would matter that half the jurors in a bank robbery case believed that the defendant was the lookout and the other half believed he was the person who entered the bank. The defendant is equally guilty of bank robbery regardless of which role he played, just as petitioner is equally guilty of first degree murder regardless of how he committed that crime.

question of guilt. Indeed, petitioner's prosecution is a good case in point. The circumstantial evidence at trial left it unclear exactly what happened when petitioner encountered Grove on or about August 1, 1978, near Prescott, Arizona, but the evidence left little room for doubt that petitioner either strangled Grove himself or participated in the robbery of Grove, in the course of which Grove was killed. Thus, whatever doubts particular jurors may have had about the correct theory of liability or the details of how the killing occurred, the evidence that petitioner committed the crime of first degree murder was compelling. In such a setting, a requirement of jury agreement on matters other than the ultimate question of the commission of the offense would only have the effect of decreasing the likelihood of the jury's reaching a verdict despite its agreement that the defendant was guilty of the crime charged.

4. The issue presented in this case has been the subject of a number of state court decisions, most of which have held that the jurors need not be instructed that they must agree on whether a defendant committed premeditated or felony murder.[6] Although to our knowledge the precise

[6] *Gray* v. *State*, 463 P.2d 897, 910-911 (Alaska 1970); *People* v. *Chavez*, 37 Cal. 2d 656, 234 P.2d 632 (1951); *People* v. *Travis*, 170 Ill. App. 3d 873, 525 N.E.2d 1137 (1988), cert. denied, 489 U.S. 1024 (1989); *State* v. *Fuhrmann*, 257 N.W.2d 619 (Iowa 1977); *State* v. *Wilson*, 220 Kan. 341, 552 P.2d 931 (1976); *Commonwealth* v. *Devlin*, 335 Mass. 555, 141 N.E.2d 269 (1957); *People* v. *Embree*, 70 Mich. App. 382, 246 N.W.2d 6 (1976); *People* v. *Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903); *Rhea* v. *State*, 63 Neb. 461, 88 N.W. 789 (1902); *State* v. *Osborne*, 49 Ohio. St. 2d 135, 359 N.E.2d 78, 85 (1976); *James* v. *State*, 637 P.2d 862 (Okla. 1981); *Newsted* v. *State*, 720 P.2d 734 (Okla.), cert. denied, 479 U.S. 995 (1986); *State* v. *Hazlett*, 8 Or. App. 44, 492 P.2d 501 (1972); *State* v. *Tillman*, 750 P.2d 546 (Utah 1987); *State* v. *Ellison*, 36 Wash. App. 564, 676 P.2d 531 (1984). Contra *State* v. *Jones*, 193 Conn. 70, 475 A.2d 1087 (1984); *People* v. *Olsson*, 56 Mich. App. 500, 224 N.W.2d 691 (1974).

issue presented here has not been the subject of any published federal court decision, several decisions of this Court in analogous settings suggest that the rule petitioner proposes is not required either by the Constitution or (in federal cases) by principles of federal criminal procedure.

In *Andersen* v. *United States*, 170 U.S. 481 (1898), this Court sustained a capital conviction of murder against challenges based on uncertainty concerning the cause of death. The Court rejected the argument that the count in the indictment on which the verdict was based was duplicitous because it charged that death occurred through both shooting and drowning. It was immaterial to the validity of the conviction, the Court held, whether death was caused by one means or the other. *Id.* at 500. The Court likewise considered it immaterial that the cause of death was not established at trial. "[T]he Government was not required to make the charge in the alternative and elect to proceed in respect of one means of death rather than the other where the murderous action was continuous." *Id.* at 504. See also *St. Clair* v. *United States*, 154 U.S. 134, 145-146 (1894). By rejecting any requirement that the government satisfy the jury as to means by which the defendant committed the murder, *Anderson* undermines petitioner's claim that the jury must be unanimous as to the means by which petitioner committed the offense of first degree murder.

The result in *Borum* v. *United States*, 284 U.S. 596 (1932), is also contrary to petitioner's position. In *Borum*, the Court sustained the capital conviction of three co-defendants for first degree murder under a count in an indictment that "alleged that the weapon was held by one of the defendants but his name was to the grand jurors unknown." *Ibid.* Each of the defendants was acquitted of the charges in three other counts of the indictment, which were identical except that they named each of the defend-

ants in turn as the one who held the murder weapon. *Ibid.* It was therefore clear, as the government argued, that

> [t]he jury's verdict on this indictment [was] to be interpreted as their statement that they were not convinced beyond a reasonable doubt that any particular defendant held the gun, but that they were convinced beyond a reasonable doubt that some one of the three defendants did hold the gun.

Id. at 597. By sustaining the convictions, the Court in *Borum* made clear that it was unnecessary for the jury to agree on the means by which the offense was committed, *i.e.*, which defendant held the gun.[7] See also *United States* v. *McGuire*, 744 F.2d 1197 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985); *United States* v. *Zeidman*, 540 F.2d at 317 ("Nor can the defendants claim prejudice because they are uncertain whether the jury convicted them of defrauding the creditor or the debtor. As in the case of a statute which can be violated in different ways, it is sufficient to convict if the jury believes that at least one of the acts of fraud was committed.").

5. Relying on *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), petitioner contends (Pet. Br. 8) that felony murder and premeditated murder must be considered

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[7] The Court in *Borum* did not articulate the basis for its decision, probably because the case was before the Court on a certificate from the Court of Appeals of the District of Columbia. 284 U.S. at 596. The question certified was whether the judgment entered upon the verdict on the fourth count could be sustained "in view of the acquittal of each and all of the defendants of the charge of murder in the first degree as contained in the first three counts of the indictment." *Ibid.* The Court answered this question " 'Yes.' *Dunn* v. *United States*, [284 U.S. 390 (1932)]." That the Court considered the question to involve only arguably inconsistent verdicts, see *Dunn*, 284 U.S. at 394, strongly suggests that the Court considered the detail of which defendant held the murder weapon to be irrelevant.

"conceptually * * * different offenses" even though they are not so defined in the statute under which he was convicted. In *Gipson*, the Fifth Circuit reversed a conviction under 18 U.S.C. 2313, (1982), which provides:

> Whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle or aircraft moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years or both.

The court held that the jury instructions were improper because they permitted the jury to convict the defendant "if each individual juror found that the defendant performed one of the six prohibited acts—receiving, concealing, storing, bartering, selling, or disposing." 553 F.2d at 458. The court believed that such a conviction would violate both the reasonable-doubt standard and the unanimity requirement embodied in Fed. R. Crim. P. 31(a). 553 F.2d at 456-458. In the court's view, the acts prohibited under the statute fell into "two distinct conceptual groupings; the first consisting of receiving, concealing and storing, and the second comprised of bartering, selling, and disposing." *Id.* at 458. Because there was evidence at trial suggesting that the defendant committed acts in each "conceptual grouping," *id.* at 459, the court concluded that the jury may not have agreed "as to just what [the] defendant did," *id.* at 457.

Petitioner's reliance on *Gipson* is misplaced for three reasons. First, the *Gipson* court's conclusion that Section 2313 contains, in effect, two distinct crimes, was a matter of statutory construction, not constitutional compulsion. Therefore, the same kind of analysis would not be applicable to a state statute that the state courts have held to constitute only a single offense.

Second, the analysis in *Gipson* would not necessarily produce the same result here, even if the analysis could be applied equally to a state statute. The court in *Gipson* made clear that it was addressing the situation in which "a criminal statute provides a number of ways of satisfying the *actus reus* element of an offense." 553 F.2d at 457.[8] That is not the situation here. Arizona's first degree murder provisions define a single *actus reus*: "the unlawful killing of a human being." Ariz. Rev. Stat. Ann. § 13-451 (1959 & Supp. 1973). See also Ariz. Rev. Stat. Ann. § 13-1105 (1989). Petitioner was charged with a single prohibited act, the murder of Lorimer Grove. Evidence at the trial concerned only a single set of events, those relating to petitioner's encounter with Grove on or about August 1, 1978. Whatever the precise outlines of a "distinct conceptual grouping" of acts as envisaged by the *Gipson* court, this case clearly involved no more than one such "grouping." The verdict therefore was not reversible under the reasoning of *Gipson*, even assuming that *Gipson* was correctly decided.

Finally, we believe that the court's analysis in *Gipson* was incorrect. As explained above, the reasonable-doubt standard requires only that the jury agree on the elements of the crime that the legislature has created. The *Gipson* court therefore should have decided, as a matter of statutory interpretation, whether 18 U.S.C. 2313 (1982) constitutes a single offense that can be committed through any

[8] See also 553 F.2d at 456-457 (posing as question before the court: "Where a single criminal statute prohibits a number of acts, and a finding by the jury that the defendant did any one of the prohibited acts is sufficient to convict him * * *, is the defendant's right to a unanimous verdict infringed if a guilty verdict is returned when all members of the jury agree that the defendant performed one of the prohibited acts, but disagree as to which of the acts he performed?") (footnote omitted).

of the prohibited acts (in which case jury agreement on which of the acts Gipson committed was unnecessary) or instead creates more than one offense (in which case the indictment charging more than one act in a single count would be subject to challenge as duplicitous).

Rather than taking this approach, the court in *Gipson* improperly relied on its own sense of "distinct conceptual groupings" to decide which factual elements were "necessary to constitute the crime with which [the defendant] [wa]s charged." *In re Winship*, 397 U.S. at 364. The court justified that approach by reference to a hypothetical "traffic control statute" prohibiting "(a) speeding, (b) driving without lights at night, (c) making a turn from the wrong lane, and (d) failing to use turn signals." *Gipson*, 553 F.2d at 458 n.8. The court believed that a defendant could not be convicted under such a statute if, on the twelve-person jury, each of four sets of three jurors concluded that the defendant committed a different one of the four prohibited acts. *Ibid.*

The court's analysis of the hypothetical traffic statute would be correct if, as the distinctive nature of the four unlawful acts suggests, the statute was intended to create four separate offenses that could be separately charged and punished. In that circumstance, a count charging all four offenses would be duplicitous, and before convicting on any one of the four offenses, a jury would have to agree that the defendant had committed that particular offense. On the other hand, the *Gipson* court's analysis would break down if the hypothetical traffic statute were intended to define a single crime, such as reckless driving, which could be proved by one or more of the four component types of driving infractions. In that setting, the jury would be required to agree only as to whether the defendant was guilty of reckless driving, and it would not matter

at all that different jurors reached that verdict based on their consideration of different infractions among those listed in the statute.[9]

The Arizona first degree murder statute is like the hypothetical reckless driving statute discussed above. It defines a single crime that can be committed in several different ways. For that reason, the requirements of jury unanimity and the reasonable-doubt standard were satisfied when the jury was instructed that it must agree, beyond a reasonable doubt, that petitioner committed the crime with which he was charged – first degree murder. The Constitution does not require that the jury also agree on the means by which petitioner committed that offense, whether through premeditated killing or felony murder.

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[9] As the example of the "reckless driving" statute demonstrates, the analysis in *Gipson* seems driven by a largely irrelevant matter of nomenclature – the reference in Section 2313 to a series of specific acts. As one commentator remarked, "If the statute had simply prohibited 'trafficking' in stolen vehicles, the court of appeals would probably not have found that a subdivision of the statute into two 'conceptual groupings' was necessary to assure that the jury determined just what the defendant did." Truitt, *Patchwork Verdicts, Different-Juror Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues*, 36 Okla. L. Rev. 473, 548-549 (1983).

CONCLUSION

The judgment of the Arizona Supreme Court should be affirmed.

Respectfully submitted.

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-vs-

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Respondent.

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QUESTIONS PRESENTED FOR REVIEW

1. The Sixth Amendment requires states to provide for trial by jury in criminal matters involving serious offenses. In federal criminal trials, that includes a requirement that the jurors return a unanimous verdict.

The questions presented are:

A. Whether petitioner waived any right to unanimity by failing to request a specific verdict form?

B. Whether the unanimous-verdict doctrine applies to state capital offenses?

C. Whether the verdict in this case satisfied the unanimity doctrine described in *Johnson v. Louisiana* and *Apodaca v. Oregon*?

D. Whether the specific-unanimity doctrine is applicable to the states in a capital case?

E. Whether the Arizona first-degree murder statute complies with the specific-unanimity doctrine if that doctrine is applicable to the states?

F. Whether the facts of this case render harmless any error that might be associated with the absence of a specific-unanimity instruction and verdict form?

2A. Whether petitioner's failure to seek direct appellate review of the theft-as-a-lesser-included-offense-of-robbery issue constitutes a waiver of that issue?

2B. Whether robbery is a lesser-included offense of first-degree murder under the statutory-elements test as applied to the Arizona first-degree murder statute?

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STATEMENT OF THE CASE

On August 9, 1978, a highway worker discovered a body in some bushes near the roadway south of Prescott, Arizona. (R.T. of June 19, 1985, at 287.) The body was in an advanced stage of decomposition reflecting that death had occurred up to a week before the discovery. (R.T. of June 20, 1985, at 375.) An autopsy revealed that the cause of death was asphyxia due to a rope found tied around the neck. (R.T. of June 19, 1985, at 361.) The circumference of the loop in the rope measured 10-1/2 inches. (R.T. of June 20, 1985, at 373.) The body was not identified at that time.

On September 8, 197[illegible], Detective Halderman of the Salt Lake City Police Department received information that Edward Schad (hereinafter petitioner), a probationer, was in the city and in possession of a stolen automobile. (R.T. of June 21, 1985, at 634.) Petitioner was arrested the next day driving a Cadillac registered to Lorimer Grove, a 74-year-old resident of Bisbee, Arizona. (*Id.*) From petitioner, Halderman recovered credit card receipts in the name of Larry Grove and a New York traffic citation issued to Edward Schad. (*Id.* at 641.) Inquiries into the whereabouts of Larry Grove led to the final identification of the body discovered near Prescott, Arizona. Petitioner was now a suspect in a murder case.

Several factors supported that suspicion. On August 3, 1978, Officer Richardson of the Arizona Highway Patrol had discovered an abandoned Ford north of Flagstaff, Arizona. (R.T. of June 20, 1985, at 454-57.) This vehicle had been rented by petitioner in Utah on December 31, 1977, and never returned. (*Id.* at 414.) It was

reported stolen on January 3, 1978. (*Id.* at 416.) When information linked Schad with the murder of Larry Grove, the police searched the impounded Ford. In the trunk of that vehicle, they found a mirror device that Mr. Grove had invented to assist in maneuvering his car to attach his travel trailer. (R.T. of June 19, 1985, at 342-43; R.T. of June 20, 1985, at 495.) This discovery linked petitioner to Mr. Grove.

Mr. Grove had been murdered sometime between August 1, when he left Bisbee to visit his sister in Washington state, and August 9, when his body was discovered. When petitioner was arrested 1 month later, he was in possession of Mr. Grove's credit cards. (R.T. of June 21, 1985, at 823.) He also possessed a number of credit card receipts reflecting charges to those cards. Expert witnesses testified that petitioner signed those receipts in the name of Larry or Lorimer Grove. (R.T. of June 25, 1985, at 945.) Testimony established that petitioner began using Grove's credit cards in Benson, Arizona, on August 2, 1978, the day after Mr. Grove left Bisbee, Arizona, and continued to charge to those cards as he travelled back and forth across the United States until September 7, 1978, in Salt Lake City, the day before he was arrested. (R.T. of June 25, 1985, at 976.)

At the time of petitioner's arrest, his girlfriend was wearing a diamond ring she said came from petitioner. That ring was identified at trial as belonging to Mr. Grove. (R.T. of June 21, 1985, at 783; R.T. of June 20, 1985, at 574.)

Petitioner was stopped for speeding in New York while driving Mr. Grove's Cadillac. When he was unable

to provide registration for that vehicle, he explained that he was transporting the vehicle for an elderly gentleman named Larry Grove. (R.T. of June 20, 1985, at 553.)

In addition, petitioner made statements to John Duncan that implicated him in the murder. He told Duncan that the Cadillac was stolen and that he would deny being in Arizona, particularly Tempe and Prescott. He also told Duncan to destroy any and all credit card receipts that he could find in petitioner's billfold. (R.T. of June 21, 1985, at 819, 824, and 825.)

The Yavapai County Grand Jury charged petitioner with one count of first-degree murder. (J.A. at 2.) The first trial took place in 1979, and resulted in a conviction of first-degree murder and imposition of the death penalty. The Arizona Supreme Court affirmed both the conviction and the sentence. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981), *cert. denied*, *Schad v. Arizona*, 455 U.S. 983 (1982). Petitioner did not raise juror unanimity or lesser-included offense as issues in that appeal.

Petitioner filed a petition for post-conviction relief which led to the grant of a new trial. The Arizona Supreme Court held that the trial court's failure to define robbery was fundamental error when robbery was the underlying felony upon which the first-degree murder conviction was premised. *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984). There was no issue of juror unanimity or lesser-included offense.

Retrial began on June 19, 1985. The focus of the defense, from opening statement through cross-examination and concluding with closing argument, was that someone other than petitioner had killed Mr. Grove. (*See*,

e.g., R.T. of June 19, 1985, at 283-84; R.T. of June 27, 1985, at 1364-66, 1373-76, 1381.) Petitioner did not seek a specific-unanimity instruction, nor did he request separate verdicts on murder with premeditation and murder committed during a felony. He did request that the trial court give the jurors the option of finding him guilty of theft, a crime that he argued constituted a lesser-included offense of murder committed during a felony. (J.A. at 3-4.) The trial court denied that request. (*Id.* at 5.)

The trial court instructed the jurors that first-degree murder is murder which is the result of premeditation or that occurs during an attempt to commit robbery. (J.A. at 26-27.) It also instructed that the jurors could find petitioner guilty of the lesser-included offense of second-degree murder. (*Id.*) The possible verdicts, to which petitioner did not object, were guilty of first-degree murder, guilty of second-degree murder, and not guilty. (*Id.* at 5.) During closing arguments, both counsel addressed the alternate methods by which first-degree murder could be committed; either by premeditation or during the course of a robbery. (I.D. at 6-7; R.T. of June 28, 1985, at 1358.) The jurors returned a unanimous verdict of guilty of first-degree murder. (*Id.* at 1411-13.)

The trial court conducted a hearing at which both aggravating and mitigating evidence was presented. (R.T. of Aug. 22, 1985.) On August 29, 1985, the trial court entered its judgment of guilt and read the special verdict. It found the existence of three statutory aggravating circumstances and no mitigating circumstances sufficient to call for leniency, and imposed the death penalty as required by law. (R.T. of Aug. 29, 1985, at 2-10.)

The automatic appeal raised 13 issues of alleged error. (Opening Brief, Arizona Supreme Court.) Issue II alleged that the trial court committed fundamental error by failing to instruct the jurors and to give a form of verdict on robbery as a lesser-included offense of murder committed in the course of a felony. (*Id.* at 17-21.) The Arizona Supreme Court held that there is no lesser-included offense to the crime of first-degree murder committed in the course of a felony. Therefore, robbery was not a lesser-included offense on which an instruction and verdict could be based. (J.A. at 39-40.)

Petitioner argued in Issue XI that the trial court committed error by failing to submit separate verdict forms for murder by premeditation and murder that occurred in the course of a felony. (Opening Brief, Arizona Supreme Court at 50.) The Arizona Supreme Court rejected that contention citing the rule in Arizona that "first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder." (J.A. at 41.) It rejected all of petitioner's contentions and affirmed the conviction and sentence. (*Id.* at 55.) Petitioner then petitioned this Court for certiorari.

SUMMARY OF ARGUMENTS

ISSUE I – JURY VERDICT

A. Petitioner's failure to raise the specific-unanimity issue in the trial court restricts the scope of this Court's review to that set forth by the "plain error" rule: highly prejudicial error that affects the substantial rights of petitioner. *United States v. Payseno*, 782 F.2d 832 (9th

Cir. 1986). Since the issue does not rise to a constitutional level, and since the evidence of both methods of commission is overwhelming and uncontested, petitioner has failed to demonstrate "plain error."

B. The unanimity-doctrine of the Sixth Amendment does not extend to the states via the Fourteenth Amendment because unanimity is not considered an essential feature of that amendment. "A requirement of unanimity, however, does not materially contribute to the exercise of [the] common sense judgment [of the group of laymen that lies between the accused and his accuser]." *Apodaca v. Oregon*, 406 U.S. 404 (1972). Nor does the due process doctrine of the Fourteenth Amendment require a unanimous verdict to satisfy the reasonable doubt standard mandated in capital cases. *Johnson v. Louisiana*, 406 U.S. 356, 363 (1972). Therefore, no federal constitutional foundation exists for petitioner's contention that a specific-unanimity instruction was required in the present case.

C. Article II, § 23 of the Arizona Constitution requires juror unanimity in all criminal cases. The jurors in this case were instructed that their verdict must be unanimous. The federal unanimity doctrine was satisfied in this case regardless of its application to the states.

D. The specific-unanimity doctrine is a rule of procedure applicable only to federal criminal trials. Rule 31(a), Fed. R. Crim. P.; *United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990). If it is a constitutional right founded in the Sixth Amendment, *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), it does not apply to the states because it is a subcategory of the general-unanimity doctrine that

does not extend to the states. *Apodaca v. Oregon*, 406 U.S. at 411-12.

E. The specific-unanimity doctrine discussed in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), applies only to a single charge that contains two distinct conceptual groups of acts sufficiently different to cause a genuine possibility of juror confusion. *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990). If this federal doctrine is extended to the states in capital cases, the Arizona interpretation of the first-degree murder statute is consistent with the federal doctrine (first-degree murder is one offense). *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982). How a criminal commits the offense is constitutionally irrelevant. *State v. Vickers*, 138 Ariz. 450, 675 P.2d 710 (1983), *cert. denied*, *Vickers v. Arizona*, 110 S. Ct. 3298 (1990).

F. If the lack of a specific-unanimity instruction is considered error of constitutional magnitude, that error was rendered harmless beyond a reasonable doubt in this case by the overwhelming evidence of guilt with respect to both methods of committing first-degree murder and because that evidence was uncontested at trial. *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988), *cert. denied*, *Downing v. United States*, 110 S. Ct. 732 (1990).

ISSUE II – LESSER-INCLUDED OFFENSES

A. Petitioner's failure to raise the theft-as-a-lesser-offense issue in the Arizona Supreme Court constitutes a waiver of review of that issue by this Court.

B. Petitioner was charged with one count of murder in the first degree, not robbery or theft. Neither robbery nor theft are included within the statutory elements of murder. Therefore, neither is a lesser-included offense of murder and no instruction or verdict form was constitutionally required. *Schmuck v. United States*, 489 U.S. 705 (1989).

ARGUMENTS

IA

PETITIONER DID NOT RAISE ANY JUROR-UNANIMITY ISSUE AT EITHER OF HIS TWO TRIALS OR AT ANY TIME PRIOR TO HIS SECOND STATE APPEAL. HE IS THEREFORE NOT ENTITLED TO REVIEW OF THIS ISSUE ABSENT A DEMONSTRATION OF "PLAIN ERROR."

Whether petitioner is even entitled to review of the juror-unanimity issue depends upon the procedural doctrine of waiver. This doctrine, as it applies here, requires the criminal defendant to raise the issue of unanimity in the trial court or convince the reviewing court that the issue involves "plain error." *United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990). Plain error is highly prejudicial error that affects the substantial rights of a defendant. *United States v. Payseno*, 782 F.2d 832 (9th Cir. 1986).

Petitioner did not address the unanimity issue by request, objection, or argument until his second state appeal. (Opening Brief at 50.) His failure to give the trial court an opportunity to resolve the question constitutes a waiver of review by this Court unless he is able to show that the absence of a specific-unanimity instruction and

verdict form was highly prejudicial and thus affected his federal constitutional rights. *United States v. Peterson*, 768 F.2d 64 (2d Cir.), *cert. denied*, *Peterson v. United States*, 474 U.S. 923 (1985); *State v. Boots*, 308 Or. 371, 780 P.2d 725 (1989). The absence of an instruction, if error, was not prejudicial to any degree and therefore could not have affected petitioner's constitutional rights.

The basic right to a unanimous verdict, founded in the Sixth Amendment, is not made applicable to the states by the due process clause of the Fourteenth Amendment. *Apodaca v. Oregon*, 406 U.S. 404 (1972). Nor does the Fourteenth Amendment's right to proof beyond a reasonable doubt entitle a state criminal defendant to a unanimous jury verdict. *Johnson v. Louisiana*, 406 U.S. 356 (1972). This case law deprives petitioner's contention of any federal basis. Without a federal constitutional basis, no substantial prejudice exists.

In addition, under the state court interpretation of Arizona law, petitioner was convicted by a unanimous jury. *State v. Schad*, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989), *cert. granted*, *Schad v. Arizona*, 111 S. Ct. 243 (1990). He was entitled to a unanimous verdict with respect to the crime charged – first-degree murder – but not with respect to the manner in which that offense was committed. *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982). This is because the mental state required for first degree murder – wilful, deliberate, or premeditate - is supplied either by evidence of premeditation or, when the murder is committed during the course of a felony, by the specific intent associated with that felony. *State v. Celaya*, 135 Ariz. 248, 254, 660 P.2d 849, 855 (1983); *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982). The

manner of commission is therefore irrelevant and not subject to a separate instruction or verdict form. *State v. Woratzeck*, 134 Ariz. 452, 455, 657 P.2d 865, 868 (1982), *Woratzeck v. Ricketts*, 820 F.2d 1450 (9th Cir. 1988). Petitioner was not prejudiced by the absence of the instruction or verdict form.

The lack of prejudice is also demonstrated by the pertinent facts of this case. The only issue before the jurors was who killed Mr. Grove. Uncontested evidence established that Mr. Grove died as a result of strangulation. (R.T. of June 20, 1985, at 361.) Petitioner did not contest the evidence that established that the murder occurred during the commission of a robbery. Manual strangulation during a robbery is an act that can only be committed with premeditation.

The state of the evidence supports unanimous conclusions that the murderer was guilty of first-degree murder by premeditation and during a felony. There is no prejudice because the outcome would have been identical regardless of the instructions and verdict forms. *See Pope v. Illinois*, 481 U.S. 497 (1988) (harmless error test for invalid instruction is whether the result would have been the same with or without the instruction).

Petitioner is unable to demonstrate the requisite prejudice and consequent effect on his federal constitutional rights. He cannot show plain error. He has no right to have this issue reviewed by this Court.

IB

THE UNANIMITY DOCTRINE IS A FEDERAL RIGHT NOT APPLICABLE TO THE STATES.

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court ruled that the Sixth Amendment right to unanimity of verdict did not extend through the Fourteenth Amendment to the states. In *Johnson v. Louisiana*, 406 U.S. 356 (1972), it held that the reasonable doubt standard of proof was not violated by a lack of juror unanimity on the issue of guilt. Petitioner seeks to overturn these cases with respect to capital cases. He contends that unanimity is essential to the notions of reliability, accuracy, and community faith in jury verdicts. His contentions are founded in both the Sixth (right to trial by jury) and Fourteenth (proof beyond a reasonable doubt) Amendments.

This Court rejected each claim noted above. With respect to the Sixth Amendment issue, the purpose of a jury trial – prevention of oppression by the court or prosecutor – was held to be protected by the "interposition between the accused and his accuser of the common sense judgment of a group of laymen." *Apodaca v. Oregon*, 406 U.S. at 410, quoting from *Williams v. Florida*, 399 U.S. 78, 100 (1970). Unanimity, said the court:

> [D]oes not materially contribute to the exercise of this common sense judgment . . . as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt.

Id. at 410-11. This rationale is applicable to capital cases as well as noncapital. The concern of the defendant

remains the same in both capital and noncapital cases: protection from the overzealous prosecutor. The method of protection is the same in both instances. The interests of all parties are well served by either unanimity or nonunanimity. *Apodaca*, 406 U.S. at 411.

Likewise inapplicable to juror unanimity contentions is the Fourteenth Amendment's standard of proof requirement – beyond a reasonable doubt – discussed in *In re Winship*, 397 U.S. 358 (1970). "[T]he Sixth Amendment has never been held to require proof beyond a reasonable doubt in criminal cases." *Apodaca v. Oregon*, 406 U.S. at 411. Nor is the lack of juror unanimity "to be equated with the existence of a reasonable doubt." *Johnson v. Louisiana*, 406 U.S. at 363. The lack of unanimity does not deprive a criminal defendant of the right to proof beyond a reasonable doubt. There is no denial of due process of law. *Id.*

These opinions are directly on point and contrary to petitioner's contentions. There is no federal constitutional basis for petitioner's argument. A unanimous verdict is not constitutionally required in capital cases.

IC

THE VERDICT IN THIS CASE SATISFIED THE UNANIMITY DOCTRINE DESCRIBED IN *JOHNSON V. LOUISIANA* AND *APODACA V. OREGON*.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court held that the Sixth Amendment right to trial by jury is extended to the states by the Fourteenth Amendment. In *Williams v. Florida*, 399 U.S. 78 (1970), this Court limited the scope of *Duncan* by ruling that a 12-person jury was

not constitutionally required. *Duncan* was further restricted by the holding in *Apodaca v. Oregon*, 406 U.S. 404 (1972), that the Sixth Amendment right to jury unanimity in federal criminal trials was not applicable to the states. In *Johnson v Louisiana*, 406 U.S. 356 (1972), the Court held that even the due process clause of the Fourteenth Amendment does not contain a right to a unanimous jury verdict. This Court has thus given the states the opportunity to set their own standards with respect to juror unanimity, so long as that standard is consistent with the standards of a fair trial. *See Burch v. Louisiana*, 441 U.S. 130 (1979) (six-person jury for nonpetty offense must be unanimous).

The Arizona Constitution mandates unanimous verdicts in all criminal trials. Ariz. Const. art. II, § 23. With respect to the first degree murder statute, the Arizona Supreme Court has consistently held that the above constitutional provision is satisfied by a general jury verdict of guilty of first-degree murder.

> The defendant is entitled to a unanimous jury verdict on whether murder has been committed.

State v Arnett, 158 Ariz. 15, 20, 760 P.2d 1064, 1069 (1988). Regardless of the unanimity doctrine's application to the states, Arizona is in full compliance.

In this case, the trial court instructed the jurors that their verdict must be unanimous. (J.A. No. 27.) The jurors returned a unanimous verdict and a poll was taken to assure that unanimity. (R.T. of June 27, 1985, at 1411-13.) The unanimity doctrine associated with the Sixth Amendment was satisfied in this case.

ID

THE SPECIFIC-UNANIMITY DOCTRINE SOUGHT BY PETITIONER IS A RULE OF PROCEDURE FOR FEDERAL TRIALS AND IS NOT APPLICABLE TO THE STATES.

Petitioner contends that, in addition to the Sixth Amendment's right to trial by jury and the associated right to a unanimous jury verdict, there exists a constitutional right in capital cases to have the jurors unanimously agree on the specific manner in which the murderer killed his victim. If a specific-unanimity doctrine does exist, it is based on the federal rules of procedure and is therefore not applicable to the states.

Rule 31(a) of the Federal Rules of Criminal Procedure requires only that "[t]he verdict shall be unanimous." A general instruction is normally sufficient to advise jurors of their duty with respect to the issue of guilt. *United States v. Peterson*, 768 F.2d 64 (2d Cir.), *cert. denied*, *Peterson v. United States*, 474 U.S. 923 (1985). No court has attempted to extend this federal rule of procedure to the states.

In 1977, the Fifth Circuit Court of Appeals interpreted the Sixth Amendment as mandating expansion of this Court's definition of unanimity to require that the jurors in a *federal* criminal trial be in "substantial agreement" with respect to the defendant's "course of action" where the charged acts fall into more than one "distinct conceptual grouping." *United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977). The decision, based on this Court's *Johnson* and *Apodaca* opinions, concluded:

> Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required.

553 F.2d at 458 (footnote omitted). Even as the Fifth Circuit applied Rule 31(a) to the Sixth Amendment, it acknowledged that its ruling would not extend to the states through the Fourteenth Amendment. *Id.* at 456.

If this Court's rationale in *Johnson* and *Apodaca* is valid, this component of the general unanimity doctrine likewise does not apply to the states through the Fourteenth Amendment. The unanimity clause of the Sixth Amendment is not fundamental to the essentials of a jury trial because the jury, a panel of one's peers, is considered sufficient protection against arbitrary law enforcement. *Johnson v. Louisiana*, 406 U.S. at 373 (Powell, J., concurring). This preexisting protection will not be enhanced by application of a portion of a federal right that this Court deems unnecessary to assure the constitutional reliability of a state criminal trial. Therefore, there is no federal constitutional basis for extending the specific-unanimity doctrine to the states, not even in capital cases.

IE

IF THE SPECIFIC-UNANIMITY DOCTRINE IS APPLICABLE TO THE STATES, THE ARIZONA FIRST-DEGREE MURDER STATUTE IS IN FULL COMPLIANCE.

In 1903, the first reported issue of specific-unanimity arose in a New York criminal trial. The defendant was charged with first-degree murder and the evidence supported both premeditation and commission during a felony. The court of appeals reviewed the elements of the state statute to determine if the legislature intended to prohibit a single offense that could be committed in alternative ways or to create distinct and separate offenses. It concluded that first-degree murder, as described by the

New York statute, was but a single offense and proof that the defendant killed either with premeditation or while engaged in the commission of a felony established guilt. It is unreasonable, said the court, to permit a defendant to escape conviction because of a difference of opinion among jurors about how the defendant murdered his victim when all agree that the defendant did do it. *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903).

A multitude of state appellate courts have utilized the *Sullivan* standard in deciding whether a trial court should instruct the jurors on separate or single offenses in both murder and nonmurder cases. *See, e.g., People v. Travis*, 170 Ill. App. 3d 873, 525 N.E.2d 1137 (1988), *cert. denied, Travis v. Illinois*, 489 U.S. 1024 (1989) (murder); *Holland v. State*, 91 Wis. 2d 134, 280 N.W.2d 288 (1979), *cert. denied, Holland v. Wisconsin*, 445 U.S. 931 (1980) (murder); *State v. Hazelett*, 8 Or. App. 44, 492 P.2d 501 (1972) (murder); *State v. Duncan*, 312 N.W.2d 519 (Iowa 1981) (burglary); *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978) (assault). The majority of those jurisdictions have adopted the *Sullivan* rationale and conclude that first-degree murder is one offense that may be committed in various ways, not separately charged offenses. Annot., *Jury Unanimity-Mode of Offense*, 75 A.L.R.4th 91 (1990).

In this case, the indictment charged petitioner with the murder of Lorimer Grove in violation of Arizona Revised Statutes §§ 13-451, -452, and -453.[1] (J.A. at 2.) The applicable portion of the cited statutes reads:

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[1] Arizona Revised Statutes §§ 13-451, -452, and -453 were repealed on October 1, 1978. All subsequent references to these statutes will be as they existed before the date of repeal.

> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree.

Arizona adopted this statute from California. Arizona Penal Code, §§ 170-72 (1913). The California Supreme Court interpreted its statute consistent with *Sullivan*, holding that, when one crime is charged in the indictment, the only issue before the jurors is whether the defendant was guilty of that crime. It is not necessary for the jurors to agree unanimously upon the theory of commission. *People v. Chavez*, 37 Cal. 2d 656, 234 P.2d 632 (Cal. 1951); *People v. Adcox*, 47 Cal. 3d 207, 253 Cal. Rptr. 55, 763 P.2d 906 (1988), *modified* (1989), *cert. denied, Adcox v. California*, 110 S. Ct. 1500 (1990).

Arizona has followed the lead of California and New York. In *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982), the state supreme court addressed a duplicitious-charge argument and rejected the contention that the statute defined two separate offenses – murder by premeditation and murder during a felony. It held instead that first-degree murder was a single offense capable of commission in alternative ways.

Shortly thereafter, the court applied *Axley* to a murder trial that raised the issue whether a single verdict denied the defendant a state constitutional right to a unanimous jury verdict. The supreme court held:

> In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. Although a

> defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict of the precise manner in which the act was committed.

State v. Encinas, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) (citations omitted); *see also State v. Lopez*, 163 Ariz 108, 111, 786 P.2d 959, 962 (1990); *State v. Smith (Edward)*, 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989); *State v. Arnett*, 158 Ariz. 15, 19-20, 760 P.2d 1064, 1068-69 (1988); *State v. Berndt*, 138 Ariz. 41, 45, 672 P.2d 1311, 1315 (1983); *State v. Hallman*, 137 Ariz. 31, 38, 668 P.2d 874, 881 (1983); and *State v. Smith (Roger)*, 136 Ariz. 273, 277, 665 P.2d 995, 999 (1983).

Federal case law has developed similarly to state law. In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the Fifth Circuit reviewed a federal conviction under 18 U.S.C. § 2313. That statute prohibited the receipt, concealment, storage, barter, sale, or disposal of a stolen motor vehicle. During deliberations, the jurors inquired if the counts were separate or singular. The trial court instructed that, if all jurors agreed that the defendant did some of the acts but did not agree on which, they could still find him guilty of selling or receiving a motor vehicle. The defendant objected that the instruction violated his right to a unanimous verdict. The circuit court initially recognized that the unanimity doctrine, founded in Rule 31(a) of the Federal Rules of Criminal Procedure and the Sixth Amendment, was a federal rule not applicable to state proceedings. *Id.* at 456. It then considered the applicability of the unanimity doctrine to a charge that prohibits several acts and yet permits the jurors to return a general guilty verdict even though they are not in

agreement about which act the defendant committed. The court focused on the actus reus as charged in the indictment and asked whether those acts were so conceptually distinct that a general verdict would not permit unanimity. The standard the circuit court applied is:

> [Whether] the acts are sufficiently analogous to permit a jury finding of the *actus reus* element of the offense to be deemed "unanimous" despite differences among the jurors as to which of the intragroup acts the defendant committed.

Id. at 458. Or conversely:

> [Whether] the two conceptual groupings are sufficiently different so that a jury finding of the *actus reus* element of the offense would not be "unanimous" if some of the jurors thought the defendant committed only an act in the first conceptual grouping while others believed he committed an act only in the second.

Id. Under the federal statute at issue, the court held that there were two distinct conceptual groupings within the six listed acts; receiving, concealing, and storing, and bartering, selling, and disposing. The court concluded that the trial court's instruction misled the jurors and permitted a less-than-unanimous verdict in violation of the Sixth Amendment. *Id.* Within each group, however, the acts were deemed sufficiently analogous to permit a unanimous verdict notwithstanding potential juror dissension about which of those acts the defendant committed. The question presented by the *Gipson* court is whether the charged offense contains conceptually distinct or analogous acts or groupings.

The federal and state standards are conceptually identical. Each recognizes that unanimity is required in obtaining a conviction. Each focuses upon the elements of the statute as described in the charge to evaluate the legislative intent in describing single or multiple offenses. Each concludes that a statute may describe a single offense that may be committed in alternate ways and therefore, unanimity is not procedurally, statutorily, or constitutionally required to distinguish between the listed methods of commission. The only issue remaining is whether Arizona's first-degree murder statute describes a single offense or conceptually distinct offenses.

State and federal appellate courts that have considered this issue have established a number of factors that reflect whether the legislature intended to fashion singular or multiple offenses, including; statute title, language, and legislative history, *State v. Tillman*, 750 P.2d 546 (Utah 1987), *Ward v. State*, 758 P.2d 87 (Alaska 1988), whether the acts are connected, consistent, or repugnant (proof of one disproves the other), *State v. Duncan*, 312 N.W.2d 519 (Iowa 1981), *State v. Hazelett*, 8 Or. App. 44, 492 P.2d 501 (1972), whether the defendant can be convicted of multiple offenses under one statute, *State v. Arnett*, 158 Ariz. 15, 18-19, 760 P.2d 1064, 1067-68 (1988), *Rice v. State*, 311 Md. 116, 532 A.2d 1357 (1987); or punished twice for conviction under that statute, *State v. Edwards*, 163 Conn. 527, 316 A.2d 387 (1972); and whether conviction under either of the alternate acts would result in the same legal consequences, *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978).

Application of the above factors to the Arizona statute supports the Arizona Supreme Court's pronouncement that first-degree murder defines a single offense that may be committed in alternate ways rather than separate, distinguishable offenses of premeditated and felony murder.

1. Statutory title and language

Arizona Revised Statutes § 13-452 is entitled *Degrees of Murder*. The title reflects an intent to divide the crime of murder into degrees but not into separate offenses within those degrees. The statutory language supports this conclusion. The legislature defined murder in Arizona Revised Statutes § 13-451 as a malicious killing. In a separate statute, it established two degrees of murder distinguished only by the defendant's state of mind. Arizona Revised Statutes § 13-452. The gravamen of the offense is the act of killing, not premeditating or robbing. Whether an accused kills with premeditation or kills during a robbery is irrelevant to prove the act of murder; the defendant's conduct is relevant only to establish the degree of the offense and therefore, the punishment. Those acts constitute the factual basis of the crime, not the offense itself. The method of accomplishing the killing is therefore immaterial to unanimity of the verdict. *Cardin v. State*, 73 Md. App. 200, 533 A.2d 928 (Md. App. 1987), *cert. denied, Cardin v. Maryland*, 488 U.S. 827 (1988) (deprivation of ownership is the focus of the theft statute, not how the theft was committed). The statutory title and language support the state court's conclusion that first degree murder is but one offense.

2. Legislative history

As noted above, Arizona adopted its statute from California. Both the California and Arizona appellate courts have concluded that the respective legislatures intended to define single rather than separate offenses. *People v. Chavez*, 37 Cal. 2d 656, 234 P.2d 632 (1951); *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982). This factor weighs in favor of a singular offense.

3. Connected and Consistent, or Repugnant Acts

This factor also weighs in favor of a finding of a singular offense. The Arizona Supreme Court has held that first-degree murder is one offense, primarily because the crime focuses on the act of killing, but also because of the connection between the alternative acts. *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982) (the premeditation element required to prove first degree murder is supplied by the intent required for the underlying felony). By proving that a killing occurred during a robbery, the state also proves premeditation. *Id.* This connection between the alternative acts provides for consistency, not repugnance. This factor weighs in favor of a singular act.

4. Multiple conviction or punishment

The Arizona Supreme Court has consistently held that first-degree murder is one offense. *State v. Smith (Roger)*, 136 Ariz. 273, 277, 665 P.2d 995, 999 (1983). Implicit in that determination is the conclusion that a

defendant cannot be convicted or punished for both murder by premeditation and murder by felony. This factor weighs in favor of finding a singular offense.

5. Legal consequence of conviction

Arizona Revised Statutes § 13-453(A) sets forth the punishment possible upon conviction of first-degree murder; death or imprisonment for life. There is no statutory distinction between murder by premeditation and murder by felony. Because first-degree murder is only one offense, *State v. Berndt*, 138 Ariz. 41, 45, 672 P.2d 1311, 1315 (1983), the legal consequence for commission of that crime is not dependent upon the method of conviction. This factor thus weighs in favor of finding a single offense.

The above factors exist for one purpose; to prevent juror confusion about which offense is at issue. *United States v. Bedonie*, 913 F.2d (10th Cir. 1990); *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986), *cert. denied*, *Schiff v. United States*, 480 U.S. 945 (1987); *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). The Arizona murder statute does not create confusion. Arizona Revised Statutes § 13-451 defines murder as a killing with malice aforethought. Arizona Revised Statutes § 13-452 divides murder into two degrees, not separate categories. Under this latter statute, jurors can find that the murder was committed with premeditation or during a felony or both. If some find murder by premeditation and some find murder by felony, there is no confusion because both methods result in the same conclusion; the defendant has committed first-degree murder. *State v. Arias*, 131 Ariz.

441, 443, 641 P.2d 1285, 1287 (1982) (the specific intent required for the felony substitutes for premeditation). Because the commission of a felony establishes premeditation, the verdict is unanimous regardless of how the jurors voted.

The Arizona statute satisfies all of the factors that indicate that a statute defines a single offense. It does not present a genuine possibility that the jurors will be confused about what conduct constitutes the offense of first degree murder. Even if the federal specific-unanimity doctrine does apply to state capital trials, it does not apply here.

IF

EVIDENCE THAT THIS MURDER WAS COMMITTED BOTH WITH PREMEDITATION AND DURING THE COURSE OF A FELONY IS OVERWHELMING. IT WAS ALSO UNCONTESTED AT TRIAL. THESE FACTS RENDER HARMLESS ANY ERROR THAT MIGHT BE ASSOCIATED WITH THE LACK OF A SPECIFIC-UNANIMITY INSTRUCTION AND VERDICT FORM.

The evidence in this case established that someone strangled Lorimer Grove and took his automobile, travel trailer, checkbook, wallet, cash, and credit cards. Petitioner did not contest the sufficiency of that evidence at trial or on direct appeal. The only question raised by petitioner was who committed that murder. By direct and cross-examination and argument to the jurors, counsel attempted to counter the state's evidence that connected petitioner to the murder by alluding to the possibility that someone else killed Mr. Grove: perhaps the Tison gang (*see Tison v. Arizona*, 481 U.S. 137 (1987), or some

unknown person that Mr. Grove might have treated to lunch in Sedona, Arizona, over a month before the murder. The defense urged the jurors to find that petitioner merely possessed Mr. Grove's belongings without having murdered him to acquire them. (R.T. of June 27, 1985, at 1381.)

Where there is but one crime charged – first degree murder – and the only issue is who committed it, the manner of commission becomes irrelevant. *State v. Tillman*, 750 P.2d 546 (Utah 1987). The harmless error doctrine set forth in *Chapman v. California*, 386 U.S. 18 (1967), is applicable when it is clear beyond a reasonable doubt that if error existed, it had no effect on the verdict. The manner in which Mr. Grove was murdered was never questioned at trial and therefore could not have affected the verdict. If the jurors found that petitioner was the perpetrator, his guilt was established without regard to the manner of its commission. If it was error to not instruct the jurors as petitioner now requests, the error was harmless beyond a reasonable doubt.

Petitioner's failure to request the instruction and verdict form is additional support for application of the harmless error doctrine. *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988), *cert. denied*, *Downing v. United States*, 110 S. Ct. 732 (1990); *Scarborough v. United States*, 522 A.2d 869 (D.C. App. 1987). Petitioner sought only to challenge the state's evidence of identity and not the crime or the manner of its commission. Any contention that the murder was not premeditated or did not occur during a felony would be inconsistent with and serve to dilute his

primary defense. The failure to request a specific-unanimity instruction supports a finding of harmless error. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977).

Finally, the state court's interpretation of the first-degree murder statute renders any error harmless beyond a reasonable doubt. In Arizona, first-degree murder is a single offense regardless of the method of commission. *State v. Sanchez*, ___ Ariz. ___, 797 P.2d 703 (Ct. App. 1990). If the offense is committed during one of the listed felonies, the specific intent required for that felony fulfills the mental element required for first degree murder; i.e., proof of a killing during the commission of robbery is the equivalent of proof of a killing with premeditation. *State v. Celaya*, 135 Ariz. 248, 254, 660 P.2d 849, 855 (1983); *see also State v. Wilson*, 220 Kan. 341, 552 P.2d 931, *overruled*, 597 P.2d 1108 (1976) (proof of a killing during the perpetration of a felony is tantamount to proof of a killing with premeditation).

The harmless error doctrine applies because any of the jurors who found that the murder occurred during a felony necessarily found premeditation. *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982); *see also United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990) (even if the evidence permitted the jurors to be split on the theory underlying the first degree murder conviction, the elements of arson-murder would necessarily have been unanimously established). Either or both methods satisfy the Arizona statute and the outcome could not have been affected. The facts and the law render any error harmless in this case.

IIA

PETITIONER'S FAILURE TO SEEK DIRECT APPELLATE REVIEW OF THE THEFT-AS-A-LESSER-INCLUDED-OFFENSE-OF-ROBBERY ISSUE CONSTITUTES A WAIVER OF THAT ISSUE IN THIS COURT.

Petitioner contends that he was entitled to an instruction and verdict form on robbery as a lesser-included offense of first-degree murder committed in the course of a felony (with robbery as the lesser-included offense) and an additional instruction and verdict form on theft as a lesser-included offense of robbery. He is not entitled to review of the latter because he never sought or received a final judgment on this issue in the Arizona Supreme Court.

This Court's jurisdiction to review state court decisions is limited by 28 U.S.C. § 1257 to final judgments and decrees rendered by the state's highest court. *Costarelli v. Massachusetts*, 421 U.S. 193 (1975). Where the state court has not rendered a judgment on the issue presented on certiorari, this Court lacks the jurisdiction to consider that issue. See *Burns v. Ohio*, 360 U.S. 252 (1959).

Petitioner requested a theft instruction at trial but he did not request a verdict form. (*Id.* at 3-5.) On direct appeal, petitioner did not challenge the trial court's refusal to instruct the jurors on theft as a lesser-included offense or the lack of a verdict form to that effect. (Appellant's Opening Brief, Arizona Supreme Court, at 17.) The Arizona Supreme Court did not address any theft issue in its opinion. (J.A. at 30-55.) The only lesser-included issue on appeal concerned robbery. (*Id.* at 39-40.) Consequently,

this Court lacks the jurisdiction necessary to review the theft-as-a-lesser-included-offense issue.

IIB

UNDER THE STATUTORY-ELEMENTS TEST AS APPLIED TO ARIZONA REVISED STATUTES §§ 13-451 AND 452, ROBBERY IS NOT A LESSER-INCLUDED OFFENSE OF FIRST-DEGREE MURDER.

Petitioner contends that *Beck v. Alabama*, 477 U.S. 625 (1980), requires an instruction and verdict form for robbery as a lesser-included offense of first-degree murder when the evidence supports a finding that the murder was committed in the course of a robbery. He urges this Court to adopt a due process requirement in capital cases that permits jurors to return a verdict on any offense less than first-degree murder that is supported by the evidence produced at trial. The law is contrary to his position.

In *Beck*, this Court held that failure to give the jurors a third option of convicting of a lesser-included offense in capital cases violated due process. That case involved an Alabama statute that prohibited giving a lesser-included offense instruction in a capital case. The state conceded that Beck would have been entitled to the lesser-included instruction as a matter of law had the statute not prohibited doing so. *Beck* is necessarily restricted to situations that involve lesser-included offenses. Neither robbery nor theft are lesser-included offenses under either federal or Arizona law. Therefore, *Beck* is inapplicable to this case.

This Court recently adopted a new standard for determining whether one offense is included within the

offense charged in the indictment. *Schmuck v. United States*, 489 U.S. 705 (1989). Rejecting the previously employed "inherent relationship" test, the Court held that a necessarily-included offense would require comparison of the statutory-elements of both offenses to determine whether the elements of the lesser offense are necessarily included within the elements of the charged offense. Is it possible, asked the Court, to commit the greater offense without necessarily committing the lesser? Does proof of the greater offense invariably require proof of the lesser? Does the lesser statute contain all of the elements of the greater, minus one? If the lesser statute contains an element that is not contained in the greater statute, it is not a "lesser-included" offense. *Id.*

Arizona determines the existence of a lesser-included offense by the same statutory-elements standard imposed on the federal courts by *Schmuck*. *State v. Mounce*, 150 Ariz. 3, 5, 721 P.2d 661, 663 (Ct. App. 1986); *State v. Poehnelt*, 150 Ariz. 136, 148, 722 P.2d 304, 316 (Ct. App. 1985). The same rationale has been applied to this state's lesser-offense analysis as was applied in *Schmuck*. Rule 23.3, Ariz. R. Crim. P.; *State v. Kinkade*, 147 Ariz. 250, 253, 709 P.2d 884, 887 (1985) (possible to commit the greater without necessarily committing the lesser); *State v. Tims*, 143 Ariz. 196, 198-99, 693 P.2d 333, 335-36 (1985) (lesser contains all the elements of the greater minus one); *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983) (evidence must support the lesser). This issue must be resolved by comparison of the pertinent statutory elements, not the inherent relationship of the offenses as presented by the evidence at trial.

The first-degree murder statute reads, in pertinent part, as follows:

> Murder is the unlawful killing of a human being with malice aforethought. . . .
>
> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree.

Arizona Revised Statutes §§ 13-451, -452. Robbery is defined as:

> [T]he felonious taking of personal property in the possession of another from his person, or immediate presence, and against his will, accomplished by means of force or fear.

Comparison of the elements of these two statutes results in the conclusion that robbery, as a matter of law, is not a lesser-included offense of first-degree murder because the elements of robbery (taking of personal property by force or fear) differ from the elements of murder (wilful, deliberate, or premeditated killing with malice). Proof of murder does not invariably require proof of robbery. Murder can be committed by poison, lying in wait, torture, avoiding or preventing escape, arson, rape, burglary, kidnapping, mayhem, or sexual molestation, all of which are independent of the statutory elements of robbery. Robbery does not contain all of the statutory

elements of first-degree murder minus one. In fact, robbery contains none of the elements of murder. The statutory-elements test conclusively eliminates robbery as a lesser-included offense of first-degree murder.

Petitioner's contention is loosely based on the "inherent relationship" standard (the evidence supports a conviction of any lesser offense). The *Schmuck* opinion rejected that analysis for determining lesser offenses and substituted the statutory-elements standard set forth above. *Beck* remains applicable only where the statutory elements of the lesser offense are a subset of the statutory elements of capital murder. Whether the evidence in this case was sufficient to sustain a conviction of robbery as well as first-degree murder is irrelevant because robbery is statutorily distinguishable from murder. Under *Schmuck*, petitioner was not entitled to either instruction or verdict form for the offense of robbery.

In addition, *Beck* was satisfied in this case by the instruction and verdict form given for second degree murder. (J.A. at 27-28.) The jurors were indeed permitted to consider a verdict of guilt of a lesser-included noncapital offense, the "third option" requirement instituted by *Beck*. They rejected that third option in favor of the first; guilty of first-degree murder. Due process was satisfied.

Petitioner attacks the Arizona rule that no lesser-included offense exists for the crime of "felony murder." He is dissatisfied with the court's explanation that the underlying felony supplies the *mens rea* necessary to satisfy the premeditation element of first-degree murder. (Brief For Petitioner at 24.) His argument ignores the rule

of law that coexists with the above-stated rule: In Arizona, first-degree murder is a single offense that may be committed in more than one way. *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982).

The result of these holdings is that, in Arizona, there is no separate offense of felony murder. A person commits first-degree murder by killing another with malice aforethought and does so wilfully, deliberately, or with premeditation, or while committing or attempting to commit a listed felony, which felony substitutes the *mens rea* necessary to satisfy the premeditation element. *State v. LeGrand (Walter)*, 153 Ariz. 21, 30, 734 P.2d 563, 572, *cert. denied, LeGrand v. Arizona*, 484 U.S. 872 (1987). When the Arizona Supreme Court states that there is no lesser-included offense for felony murder, it necessarily incorporates these previous decisions and concludes that proof of the commission of a felony is not invariably necessary to prove first-degree murder. Because robbery is not necessarily required to prove murder, it cannot constitute a lesser-included offense. *State v. Mounce*, 150 Ariz. 3, 5, 721 P.2d 661, 663 (Ct. App. 1986). Due process does not require instructing on a lesser-included offense where there is no lesser-included offense. *Beck v. Alabama*, 447 U.S. at 636.

Petitioner's contention with respect to theft as a lesser-included offense is wholly without merit. He argues that robbery is a lesser-offense of murder by felony and theft is a lesser offense of robbery. (Brief for Petitioner at 22-23.) In addition, he submits that the evidence supports a reasonable inference that he acquired Mr. Grove's property without force, fear, or murder. (*Id.*) Consequently, he proposes that *Beck* required that the

jurors be permitted to find him guilty of theft as a lesser-included offense of robbery, which was a lesser-included offense of first-degree murder by felony. This convoluted rationale is without legal or factual basis.

Respondent has discussed above why robbery, as a matter of law, is not a lesser-included offense of first-degree murder-felony. In addition, petitioner's attempt to extend *Beck* is not justified by the rationale on which that case is founded. The Court in *Beck* began its analysis by recognizing the rule that the jurors could return a verdict on any offense "necessarily included in the offense charged." 447 U.S. at 633. The flaw in petitioner's argument is that theft is not a lesser-included offense of first-degree murder; it is a lesser-included offense of robbery. The jurors could not return a guilty verdict for an offense that is neither charged nor necessarily-included within the charged offense. *Beck* does not require the trial court to instruct on any offense that may be proved by the evidence, only those that are included within the charged offense. Petitioner was not entitled to have the jurors instructed on theft as a lesser offense of first degree murder.

Finally, petitioner was not entitled to a lesser-included offense instruction and verdict form for theft because there was no evidence to support either. An instruction on a lesser-included offense can be given only "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S 205 (1973). Due process prohibits instructing on a lesser-included offense where there is no supporting evidence. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

Further, under Arizona law, for a defendant to be entitled to a lesser-included offense instruction, there must be some affirmative evidence to support the lesser offense; the mere possibility that the jurors might choose to disbelieve a portion of the state's case does not entitle the defendant to a lesser-included offense instruction. *State v. Leon*, 104 Ariz. 297, 300, 451 P.2d 878, 881 (1969); *State v. King*, 67 Ariz. Adv. Rep. 56 (Ct. App., Aug. 23, 1990). In the present case, petitioner presented absolutely no evidence how he acquired Mr. Grove's car or credit cards or checkbook. He did not testify. He did not present any witnesses to testify that the items were stolen rather than taken during a robbery. His cross-examination of state witnesses did not produce any evidence to show how he came to possess Mr. Grove's property. The defense focused exclusively on identity of the killer, not on petitioner's acquisition of the property. The theft theory was produced from counsel's argument, not testimony. (J.A. at 23.) Argument is not evidence.

This lack of evidence destroys any support that petitioner might otherwise have had for a lesser-included offense instruction. There was no due process violation under *Beck* because petitioner was not entitled to a lesser-included instruction.

CONCLUSION

In order for petitioner to prevail, this Court has to overrule both *Johnson* and *Apodaca* and extend the Sixth Amendment unanimity doctrine to state capital cases. That would not provide petitioner any greater protection

than he now receives under the existing interpretations of both federal and state constitutions. There is no purpose to be served by disturbing settled law. If, however, the federal constitutional provision is extended to Arizona Revised Statutes §§ 13-451 and -452, petitioner was not entitled to a specific verdict because murder in Arizona consists of a single offense that results in unanimity of verdict regardless of the mode of commission, not conceptually distinct acts that require separate verdicts to insure unanimity.

Robbery is not a lesser-included offense of the crime of first-degree murder even if the murder is committed during a robbery. The due process clause of the Fourteenth Amendment was satisfied by giving the jurors the opportunity to find petitioner guilty of second-degree murder, a noncapital offense.

For the above-stated reasons, respondent urges this Court to reject petitioner's contentions and uphold the opinion of the Arizona Supreme Court.

Respectfully submitted,

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FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1990

EDWARD HAROLD SCHAD, JR.,

Petitioner,

v.

ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arizona

PETITIONER'S REPLY BRIEF

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Most of respondent's arguments are adequately addressed in petitioner's opening brief. This Reply, therefore, addresses only those contentions made in respondent's brief which were not directly addressed in the opening brief.

I. PETITIONER'S CLAIMS WERE NOT WAIVED.

Respondent asks this Court for the first time not to review the jury "unanimity" issue on which this Court has granted certiorari on the theory that this issue was waived by trial counsel's failure to object to the verdict forms at tria1.[1] This Court need only read the opinion below to conclude that respondent is flatly wrong. This is because the Arizona Supreme Court fully reviewed the merits of the jury unanimity issue petitioner has raised here. Nowhere does the Arizona Supreme Court find this issue waived. JA at 40-41.

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[1] Respondent also urges this Court not to review petitioner's claim that he was entitled to a lesser included instruction on theft because this issue was not raised on direct appeal. Respondent misunderstands petitioner's argument. The trial court's refusal to instruct the jury on the lesser included instruction of theft is not raised here as a separate claim. Rather, we simply note that because the evidence at his trial supported a conviction for robbery, JA at 40, and, as a matter of law, theft is a lesser included offense of robbery, *State v. Celaya*, 135 Ariz. 248, 660 P.2d 849 (1983), petitioner would have been entitled as a matter of state law to a lesser included instruction for theft but for Arizona's automatic rule that there are no lesser included offenses of felony murder. A theft instruction was particularly warranted here where the evidence presented against petitioner at trial supported, at best, no more than a theft conviction.

It is only where a state court makes a plain statement relying on adequate and independent state grounds for its decision that review by this Court is barred. A state court's complete silence is not a "plain statement" that "clearly and expressly" relies on a state procedural default as a separate, adequate, and independent state ground for denying relief. *Michigan v. Long*, 463 U.S. 1039 (1983); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985); *Harris v. Reed*, 109 S.Ct. 1038, 1045 (1989). Since the Arizona Supreme Court reviewed the jury "unanimity" issue on the merits, with no mention of procedural default, this Court's review is neither waived nor limited.[2]

[2] The cases Respondent cites do not support his argument for a limited review for plain error of this issue. In the two federal cases respondent relies on, *United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990), and *United States v. Peterson*, 768 F.2d 63 (2nd Cir.), *cert. denied*, 474 U.S. 923 (1985), the appellate court chose to limit its review of the jury unanimity issue based on trial counsel's failure to object to the verdict forms in the federal trial court. Petitioner has no quarrel with those decisions; they are simply irrelevant here where no waiver finding was made by the Arizona Supreme Court and review of the issue was not limited. The state case respondent relies on for this same proposition, *State v. Boots*, 308 Or. 371, 780 P.2d 725 (1989), says nothing about waiver or limited review of the jury unanimity issue. Like the Arizona Supreme Court here, the Oregon Supreme Court fully reviewed the issue.

II. RESPONDENT'S ONE OFFENSE RATIONALE IS IRRECONCILABLE WITH DUE PROCESS AND SIXTH AMENDMENT GUARANTEES.

A. Petitioner Received Neither a Unanimous Jury Verdict Nor an Agreement by a Substantial Majority.

Respondent argues that unless this Court is willing to overrule *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), jury unanimity cannot be constitutionally required in capital cases. Resp. Br. at 11, 34. That is not so.

Johnson and *Apodaca* do not address, much less decide, whether jury unanimity is constitutionally required in capital cases. *Johnson* and *Apodaca* merely held that in *non*capital cases, a verdict returned by at least a 75% majority of the jury did not offend due process or sixth amendment principles.

Johnson did not reject, as respondent contends, any relationship between the reasonable doubt standard and jury unanimity; it simply found that relationship insufficient basis to require unanimous jury verdicts in state noncapital cases where a substantial majority of the jury agrees on the defendant's guilt. But a capital case is a different matter altogether – because in a capital case, the constitutionally tolerable risk of factual error is less. *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

Even if capital cases did not require *unanimous* verdicts, the verdict returned against petitioner in this case would be unconstitutional under *Johnson* and *Apodaca*. There is no assurance that petitioner's jury did anything

more than divide equally on the respective factual findings necessary for conviction of premeditated murder and felony murder. That certainly is not a verdict of a "substantial majority of the jury" – the constitutional minimum required under *Johnson* and *Apodaca* even in noncapital cases. *Johnson*, 406 U.S. at 362. *See also Ballew v. Georgia*, 435 U.S. 237 (1978); *Burch v. Louisiana*, 441 U.S. 130 (1979).

B. Premeditated Murder and Felony Murder are Two Distinct Offenses.

Although premeditated murder and felony murder have different elements, respondent argues that these crimes nevertheless are "one" because the premeditation element of premeditated murder is "supplied" by the intent required for the underlying felony element of felony murder. Resp. Br. at 22. Legally and factually, that argument is wrong.

Elements of offenses cannot be substituted for one another. The elements of premeditation, deliberation and wilfulness that are essential to the crime of premeditated murder are not elements of felony murder. *State v. Minifield*, 110 Ariz. 599, 522 P.2d 25 (1974). On the other hand, felony murder – but not premeditated murder – requires proof that the defendant had the requisite intent to and did commit the specified underlying felony. *State v. McLoughlin*, 139 Ariz. 481, 485, 679 P.2d 504 (1984).

Thus, premeditated murder and felony murder also differ in the ultimate factual findings required for conviction. See *State v. Boots*, 308 Or. 371, 780 P.2d 725, 727 (1989) (robbery felony murder with intent to kill and

killing that occurs to conceal the identity of the robbers are factually different and jury required to reach unanimous decision on element required by each subsection of statute). Indeed, respondent concedes as much when it discusses the "alternative acts" of the two offenses. Resp. Br. at 20, 22.

In practice, not even the Arizona courts take the "one offense" proposition seriously. Thus, in *State v. Lopez*, 158 Ariz. 258, 266, 762 P.2d 545, 553 (1988), the Arizona Supreme Court reversed the defendant's "one offense" conviction of "first degree murder" when it found insufficient evidence to sustain a felony murder conviction. Although the jury had been instructed on both premeditated murder and felony murder and returned a "one offense" verdict of "first degree murder," the court remanded the case for a new trial on premeditated murder only. So, too, have Arizona trial courts recognized the factual difference between the two offenses. In *State v. Axley*, 132 Ariz. 383, 391, 646 P.2d 268, 276 (1982), the trial court directed a verdict on premeditated murder at the close of the state's case and instructed the jury only on the separate elements of felony murder. This same result was reached in *State v. Clayton*, 109 Ariz. 587, 514 P.2d 720 (1973), where the trial court granted the state's motion to dismiss the first count of premeditated murder at the close of the state's case and instructed the jury on only the second separately indicted count of felony murder arising out of the same incident.[3]

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[3] More recently, at the urging of the Arizona Supreme Court, *State v. Walton*, 159 Ariz. 592, 594, 769 P.2d 1017, 1038-40 (1989) (Feldman, V.C.J., and Moeller, J., concurring), *aff'd on*

The logical consequences of respondent's "one offense" argument would be astounding. According to that argument, the state could lump all "class four" felonies under one statute titled "Class Four Felony"; charge the defendant with that "one offense"; and obtain a conviction as long as each of the jurors chose at least one of the several offenses identified as a class four felony. By doing so, the state would eliminate the constitutional requirement of jury agreement on the facts essential to prove *any* of the factually distinct felonies contained in the "offense". If *Johnson* and its progeny require anything, they certainly require more than a general verdict that a defendant committed some unspecified felony.[4] At the very least, the Constitution requires that the state prove beyond a reasonable doubt every fact that the law has defined as essential to the particular crime. Petitioner asks no more than that.

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other grounds, Walton v. Arizona, 110 S.Ct. 3047 (1990), Arizona trial courts have been doing what petitioner asks be done here: giving juries two forms of verdict for the two offenses. See *State v. Smith,* 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989) (jury instructed on both premeditated murder and felony murder returned verdict of felony murder).

[4] Respondent also contends that requiring the jury to unanimously agree on the factual elements of premeditated murder and felony murder creates jury confusion. Resp. Br. at 23. In fact, the opposite is true. *Comer v. Arizona,* 779 P.2d 333 (1990), *petition for cert. filed,* ___U.S. ___ (January 18, 1991) (jury note asking whether ten votes for premeditated murder and two votes for felony murder was a unanimous verdict); *State v. Smith,* 160 Ariz. at 513, 774 P.2d at 817 (jury given two forms of verdict on premeditated murder and felony murder and returned guilty verdict of felony murder).

III. RESPONDENT MISUNDERSTANDS THE HOLDING IN *BECK V. ALABAMA.*

Respondent argues that *Beck v. Alabama,* 447 U.S. 625 (1980), requires only that a trial court, in a death penalty case, permit the jury to consider *some* noncapital offense, and that this requirement was satisfied in this case by the giving of a second degree murder instruction. The problem with this argument is that it incorrectly assesses the holding in *Beck.*

The holding in *Beck* was based on this Court's concern for "rules that diminish the reliability of the guilt determination" in capital cases. *Beck,* 447 U.S. at 638. The idea behind *Beck* is that a jury which might have a reasonable doubt about an element of the state's capital case should be given an opportunity to find the defendant guilty of a lesser included offense, rather than being forced to choose between a potentially unreliable capital conviction and outright acquittal. The test for determining whether *Beck* is satisfied is not the number of options given to the jury, see *Hopper v. Evans,* 456 U.S. 605, 611 (1982); *Roberts v. Louisiana,* 428 U.S. 325, 334-35 (1976) (plurality opinion); it is whether the instructions respond to the elements of the offense that may be in doubt in the state's capital case.

In this case, the evidence was clear that petitioner was in possession of the victim's property, but it left considerable doubt regarding whether, or under what circumstances, petitioner killed the victim. The trial court's instructions denied those jurors who may have doubted that petitioner killed the victim the option of convicting him of a lesser included offense, the elements

of which did not include a killing. The instructions thus denied those jurors the opportunity, required by *Beck*, to return a verdict in conformity with their reasonable view of the evidence.

Respondent seems to suggest that *Beck* only requires the giving of "lesser included offense" instructions in capital cases, and that robbery was not a lesser included offense in this case. But even if respondent's interpretation of *Beck* were correct, respondent's conclusion would not follow. This is because robbery plainly *was* a lesser included offense of murder in the perpetration of a robbery, one of the capital offenses with which petitioner was charged.[5]

Respondent also argues that *Beck* requires a lesser included offense instruction in capital cases only when the evidence supporting such an instruction emanates from the defendant. Resp. Br. at 34. Respondent argues, in effect, that to obtain a lesser included offense instruction in a capital case, a defendant must *submit* evidence sufficient to permit a rational juror to convict him of the lesser offense. This position is incorrect for three reasons.

First, petitioner *did* present evidence, by way of cross examination, from which the jury could find that he committed a robbery, but not a felony murder. Second, even if respondent's view of "presenting" evidence were correct, forcing a defendant to present evidence to obtain

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[5] Even if robbery had been only a "necessarily included offense," *Beck* and *United States v. Schmuck*, 489 U.S. 705 (1989), would have required the giving of a robbery instruction in this case.

a lesser included offense instruction would be constitutionally impermissible. Such a rule would contravene the defendant's fifth amendment right against self-incrimination and would create the "intolerable" situation in which "one constitutional right [would] have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). *Accord United States v. Salvucci*, 448 U.S. 83, 89-90 (1980); *Lefkowitz v. Cunningham*, 431 U.S. 801, 806-07 (1977); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972). Third, respondent's argument ignores the fact that it is the *state's* burden to prove every element of the offense charged beyond a reasonable doubt.

Where more than one inference can be drawn from the evidence, regardless of who presents it, it is for the jury, and not the court, to determine which inference should be drawn. "The evidence as to [the lesser included offense] need not be uncontradicted or in any way conclusive" before the jury should be charged regarding that offense. *Stevenson v. United States*, 162 U.S. 313, 315 (1896). "So long as there was some evidence" relevant to the lesser included offense, "the credibility and force of such evidence must be for the jury, and cannot be [a] matter of law for the decision of the court." *Id.*

In capital prosecutions based on circumstantial evidence that permits conflicting inferences, both the state and the defendant must be allowed to urge the jury to find whatever favorable set of facts the conflicting inferences will support, and the jury must be allowed to return the full range of verdicts legally implicated by those facts. In the instant case, petitioner's conviction

must be reversed because the jury did not have the option of convicting him of robbery instead of murder.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

EDWARD HAROLD SCHAD, Petitioner

- versus -

STATE OF ARIZONA, Respondent

On Writ Of Certiorari To The
Supreme Court Of Arizona

BRIEF OF AMICI CURIAE FOR RESPONDENT ARIZONA BY KENTUCKY AND CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND VIRGINIA

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QUESTIONS PRESENTED FOR REVIEW

1. Does a jury instruction combining alternative theories of guilt, both of which are supported by evidence, deprive the defendant of a unanimous verdict?

2. Do the Eighth Amendment and the Fourteenth Amendment's Due Process Clause permit state law to determine when a lesser-included offense instruction should be given?

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INTERESTS OF AMICI CURIAE IN SUPPORT OF RESPONDENT ARIZONA

The amici curiae represented here are States interested in whether or not the Sixth, Eighth and Fourteenth Amendments require a unanimous verdict on the manner in which the offense of first-degree murder was committed, and the circumstances under which jury instructions on lesser degrees of the charged offense must be given.

Amici submit this brief in support of Respondent, the State of Arizona, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

I.

The courts below correctly held that the Sixth and Fourteenth Amendments do not require a unanimous jury verdict on the manner in which a defendant committed first-degree murder. To rule otherwise would substantially depart from the premise of this Court that jury unanimity is not a constitutional right. It would also

interfere with the prerogative of State legislatures whose function is to determine public policy concerning crimes and punishments.

A plurality of state and federal courts have held that juries need not unanimously agree on the manner in which the crime was committed when the statute permits conviction under either one of two theories so long as the evidence supports the existence of either.

II.

The United States Constitution permits each State to define the elements of a criminal offense. Whether one offense constitutes a lesser-included offense of a second offense which imposes a greater punishment must be determined as a matter of State law. The fact that two offenses are the "same offense" for purposes of collateral estoppel (prosecution preclusion) under the Double Jeopardy Clause does not necessarily establish that one offense is a lesser-included offense of the other. Since it is possible to commit felony murder without committing a robbery and possible to

commit robbery without committing felony murder, robbery is not a lesser-included offense of felony murder under the statutory elements test. Even when one offense (robbery) is a lesser-included offense of another offense (felony murder), neither the Eighth Amendment nor the Due Process Clause requires that the jury be instructed on the lesser offense unless there is evidence which would rationally permit a jury to find a defendant guilty of the lesser offense and acquit him of the greater offense. The States may constitutionally impose upon the defendant the burden of producing evidence to support a lesser-included offense instruction by creating a factual dispute on the element or elements differentiating the lesser offense from the greater offense.

ARGUMENT

I. AN INSTRUCTION COMBINING TWO ALTERNATIVE THEORIES OF GUILT, BOTH OF WHICH ARE SUPPORTED BY EVIDENCE, DOES NOT DEPRIVE THE DEFENDANT OF A UNANIMOUS JURY VERDICT.

A. THE UNITED STATES CONSTITUTION DOES NOT REQUIRE UNANIMITY OF VERDICT IN STATE COURT CRIMINAL PROCEEDINGS.

Petitioner argues that the Sixth Amendment

and the Due Process Clause of the Fourteenth Amendment require a unanimous verdict in state court criminal proceedings as to the manner in which a crime was committed. Petitioner alleges that unanimous agreement on the manner in which the crime was committed is required to give effect to the reasonable doubt standard. The requirement of unanimity, however, can be found nowhere within the Constitution. The Court has held that a state court conviction by less than a unanimous jury does not violate the Sixth Amendment right to a trial by jury. Apodaca v. Oregon, 406 U.S. 404 (1972). The Court reached this holding after reviewing the constitutional history of the Sixth Amendment discussed in Williams v. Florida, 399 U.S. 78 (1970). The legislative history indicates the language of the Sixth Amendment was altered from the original form introduced by James Madison. The wording of the amendment that emerged from the House Committee no longer contained the phrase, "unanimity for conviction." The Court opined that, "The deletion was intended to have some

substantive effect." Apodaca, 406 U.S. at 410. See Williams, 399 U.S. at 96-97. Therefore, the Court focused on the function the jury serves in contemporary society and noted:

> (T)he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen.

Apodaca, 406 U.S. at 410, quoting Williams, 399 U.S. at 100. The unanimity requirement, however, "does not materially contribute to the exercise of this commonsense judgment." Apodaca, 406 U.S. at 410. Thus, "The Sixth Amendment does not require proof beyond a reasonable doubt at all." Apodaca, 406 U.S. at 412. The Court has expressly stated that due process of law does not require jury unanimity. Johnson v. Louisiana, 406 U.S. 356, 360 (1972). Jury unanimity is a right flowing from federal statute,[1] not the Constitution. United States v. Gipson, 553 F.2d 453, 457 (5th Cir. (1977),

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[1]Rule 31(a) of the Federal Rules of Criminal Procedure requires a unanimous jury verdict in a federal criminal trial.

cited by Petitioner, acknowledges that there is no unanimous verdict requirement in state criminal proceedings.

> In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictment and permits prosecution upon information, nor by law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict.

Jordan v. Massachusetts, 255 U.S. 167, 176 (1912) (dictim) (emphasis added). See Johnson, 406 U.S. at 359. The decision as to unanimity of verdict is properly left to the state legislatures.

> We are not invested with the jurisdiction to pass upon the expediency, wisdom, or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the gauge of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations.

Twining v. New Jersey, 211 U.S. 78 (1908). This view was reaffirmed in Patterson v. New York, 432 U.S. 197, 201 (1977):

> Preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. [Citation omitted].

The concurrence in Johnson echoes the Court's opinions in Twining and Patterson:

> . . . I do not imply that I regard a State's split-verdict system as a wise one. My vote means only that I cannot conclude that the system is constitutionally offensive. Were I a legislator, I would disfavor it as a matter of policy. Our task here, however, is not to pursue and strike down what happens to impress us as undesirable legislative policy.

Johnson, 406 U.S. at 365, (Blackmun, J., concurring). The Arizona system which permits a jury to convict of first-degree murder by finding premeditation or felony murder does not violate any federal constitutional right.

B. A NUMBER OF JURISDICTIONS HOLD THAT A DEFENDANT IS NOT ENTITLED TO A UNANIMOUS VERDICT ON THE PRECISE MANNER OR THEORY IN WHICH THE OFFENSE WAS COMMITTED.

The Arizona Legislature has chosen to classify murder into first and second degrees. First-degree murder is committed by

premeditation or in the course of a felony. Ariz.Rev.Stat. §13-1105 (Appendix). It is only one crime, however, and this protects a defendant against double jeopardy. State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982).

> Because murder is a single offense, the State is ordinarily required to proceed upon all available theories in a single prosecution, and it may not bring seriatim prosecutions for the same offense by alleging separate legal theories.

State v. Arnett, 760 P.2d 1064, 1069 (Ariz. 1988) quoting Ross v. State, 519 A.2d 735, 739 (Md. 1987). The defendant is entitled only to a unanimous verdict on whether first-degree murder was in fact committed, not to a unanimous verdict on the precise manner in which the crime was committed. Arnett, 760 P.2d at 1069. See State v. Smith, 665 P.2d 995, 999 (Ariz. 1983); State v. Berndt, 672 P.2d 1311 (Ariz. 1983). See generally United States v. Bouquett, 820 F.2d 165 (6th Cir. 1987) (drug prosecution); United States v. McPherson, 782 F.2d 66 (6th Cir. 1986) (embezzlement) (per curiam); United States v. Acosta, 748 F.2d 577 (11th Cir. 1984)

(embezzlement or misapplication). Arnett concluded that the jury could have found the defendant guilty of first-degree murder based on any of three theories.

> Because the verdict need not specify under which theory the defendant was convicted, and because we find ample evidence to support each theory, we affirm the defendant's conviction of first-degree murder.

Arnett, 760 P.2d at 1069. Arnett v. Ricketts, 665 F.Supp. 1437, 1441 (D.Ariz. 1987), upheld State v. Arnett, 760 P.2d 1064 (Ariz. 1988). The defendant asserted Sixth and Fourteenth Amendment challenges claiming the jurors may not have unanimously agreed on the manner in which he committed first-degree murder. The federal district court rejected these constitutional claims holding that a person is "not entitled to a unanimous verdict on the precise manner in which the act was committed." Arnett, 665 F.Supp. at 1441.

Support for Arizona's approach[2] is

[2]See Annotation, "Requirement of Jury Unanimity as to Mode of Committing Crime Under Statute Setting Forth the Various Modes by Which Offense may be Committed," 75 ALR 4th 92 (1990).

found as early as 1903 in the case of People v. Sullivan, 65 N.E. 989 (1903). Sullivan has been quoted at length in Holland v. State, 280 N.W.2d 288, 292 (Wis. 1979), cert. denied, 445 U.S. 931 (1980) and in People v. Travis, 525 N.E.2d 1137, 1147 (Ill.App. 4 Dist. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1149 (1989).

The New York Court of Appeals in Sullivan reviewed the defendant's claim that his right to a unanimous verdict was violated because the jury was permitted to convict him by concluding he committed premeditated or felony murder. The court affirmed the conviction stating:

> There was but a single crime charged in the indictment against the defendant -- that of murder in the first-degree; and the only issue to be determined by the jury was whether the defendant had been guilty of that crime. Under our statute . . . so far as applicable to the case before us, proof either that the defendant killed the deceased with a deliberate and premeditated design to affect his death, or while the defendant was engaged in the commission of a felony, or an attempt to commit a felony, though without any design to take life, established his guilt of the crime charged. 'It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be

> justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other.' Murray v. Insurance Co., 96 N.Y. 614, 48 Am.Rep. 658. So, in this case, it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or in an attempt to commit one. It was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first-degree as that offense is defined by the statute.

Sullivan, 65 N.E. at 989-990. See People v. Adcox, 763 P.2d 906 (Cal. 1988).

Holland, supra, reviewed a second-degree murder conviction where the defendant claimed the jury should have agreed unanimously as to the manner of participation in the crime. Holland distinguished the holding in United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) by noting that the six acts prohibited in the Gipson statute fell into two different conceptual groupings. Within each grouping the acts were similar enough to allow a finding of the actus reus element of the offense despite

differences among jurors as to which of the intragroup acts the defendant committed. "[T]he two groups, however, were conceptually distinct such that a jury finding the actus reus element of the offense would not be unanimous." Gipson, 553 F.2d at 548. The court held, however, that unanimity was required only on the ultimate issue on the guilt of the crime charged. Unanimity was not required on the three alternative theories (direct commission, aiding and abetting and conspiracy) upon which the second-degree murder could have been accomplished. Holland, 280 N.W.2d at 292. In essence, these three theories were in the same conceptual grouping and therefore did not violate the state constitutional right to unanimous verdict. See, e.g., Travis, supra, (quoting Sullivan and Holland in holding that jury verdict need not be unanimous on alternate ways in which crime can be committed); State v. Williams, 285 N.W.2d 248, 270 (Iowa 1979), cert. denied, 486 U.S. 921 (1980) (holding the actus reus is identical for either premeditated murder

or felony murder). See also United States v. McPherson, 782 F.2d 66 (6th Cir. 1986) (per curiam); State v. James, 698 P.2d 1161 (Alaska 1985).

> Juries are typically called upon to render unanimous verdicts on the ultimate issues of a given case. But it is understood that different jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.

McKoy v. North Carolina, ___ U.S. ___, 110 S.Ct. 1227 (1990) (Blackmun, J., concurring).

1. Jurisdictions Rejecting Instructions Requiring Jury Unanimity On Manner In Which First-Degree Murder Occurred.

The Oklahoma Court of Criminal Appeals specifically addressed claims of due process violations regarding jury unanimity in James v. State, 637 P.2d 862 (Okla.Cr. 1981). The defendant claimed his due process rights were violated because the jury was not instructed to unanimously find either that he committed murder with malice aforethought or while committing robbery with a dangerous weapon. The court acknowledged that due process required each

element of a crime to be proven but concluded that this had been accomplished.

> The State established a prima facie case of murder in the first-degree by proving first, that the homicide occurred during an armed robbery, and therefore, fell within felony murder; and second, that the appellant had committed the homicide with premeditation. No violation of due process occurred.

James, 637 P.2d at 865. To the same effect is the holding in Newsted v. State, 720 P.2d 734 (Okla.Cr. 1986), cert. denied, 479 U.S. 995 (1986). Newsted claimed his due process rights were violated because the court had not instructed the jury to unanimously find guilt on the two theories comprising first-degree murder: malice aforethought or while committing robbery with a dangerous weapon. The court ruled no violation of due process occurred and based its decision on the holding in James, supra. Newsted, 720 P.2d at 737. See also People v. Guerra, 708 P.2d 1252 (Cal. 1985).

The Washington Court of Appeals examined this issue in State v. Ellison, 676 P.2d 531 (Wash.App. 1984). The court stated that the

determining factor was whether the criminal statute describes a single offense which can be committed in more than one way rather than separate and distinct offenses. To determine if the statute describes multiple offenses or a single offense committable in different ways the court used the following criteria:

> [1] the title of the act; [2] whether there is a readily perceivable connection between the various acts set forth; [3] whether the acts are consistent with and not repugnant to each other; [4] and whether the acts may inhere in the same transaction.

Ellison, 676 P.2d at 537. Comparing these factors to first-degree murder and felony murder, the court concluded they met the above criteria. Thus, an instruction was not required on unanimity as to the means by which the defendant committed murder where both theories were supported by sufficient evidence. Ellison, 676 P.2d at 538. See also Brown v. State, 473 So.2d 1260 (Fla. 1985), cert. denied, 474 U.S. 1038 (1985) (Rejecting request for special verdict forms which would have indicated whether first-degree murder conviction was based upon

premeditation or felony murder).

2. Jurisdictions Upholding Instructions Informing Jury That Verdict Need Only Be Unanimous As To First-Degree Murder And Not As To The Manner In Which The First-Degree Murder Occurred.

In People v. Milan, 507 P.2d 956, 961 (Cal. 1973) the California Supreme Court reviewed a claimed error in the following jury instruction:

> It is not necessary that all jurors agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of robbery, or in an attempt to commit one; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant committed the crime of murder in the first-degree as that offense is defined.

The court upheld the giving of this instruction citing previous caselaw and the general premise that it was not necessary that all jurors unanimously agree on the theory in which the first-degree murder occurred. Milan, 507 P.2d at 962. See also People v. Nye, 403 P.2d 736 (Cal. 1965), cert. denied, 384 U.S. 1026-1027 (1966); People v. Chavez, 234 P.2d 632 (Cal. 1951).

Similarly, in State v. Hazelett, 492 P.2d 501 (Or.App. 1972) the defendant claimed the court erred in instructing the jury it need not unanimously agree on whether the killing was premeditated or felony murder as long as they unanimously agreed on guilt for first-degree murder. While acknowledging that in some cases this type of instruction would be error if the state's case included evidence of numerous acts, the Oregon Court of Appeals concluded:

> Here, there was only one act charged and proved -- the act of taking the life of the victim. Whether this was done with premeditation or while attempting rape related to the defendant's mental state, and did not relate in any way to the act charged. Since the legal effect of committing the act is the same whether done with premeditation or while attempting rape, there is no reason to require the jury to unanimously agree on which of the two possible mental states, both equally culpable, defendant possessed at the time of the murder charged.

Hazelett, 492 P.2d at 503.

3. Jurisdictions Rejecting Defendant's Motion That At Close Of Evidence The State Elect Which Theory Of First-Degree Murder Would Be Submitted To The Jury.

State v. Silhan, 275 S.E.2d 450 (N.C. 1981)

reviewed a claim of error that at the close of evidence the prosecutor was required to elect which theory of first-degree murder (felony murder or murder with premeditation and deliberation) would be submitted to the jury. The North Carolina Supreme Court rejected this argument stating the evidence was sufficient to establish a prima facie case on either theory. "[I]t became the responsibility of the jury to weigh the evidence to see if it warranted a finding that defendant was guilty of murder in the first-degree upon either or both theories." Silhan, 275 S.E.2d at 462. To the same effect see State v. Lamb, 497 P.2d 275, 290 (Kan. 1972) overruled on other grounds State v. Jacques, 587 P.2d 861 (Kan. 1978) (upholding information charging premeditated and felony murder as sufficiently apprising defendant that state would proceed on both theories); State v. Jefferson, 529 S.W.2d 674, 678 (Tenn. 1975) (upholding indictment charging first-degree murder based on different "means and intents"); see also United States v. White, 879 F.2d 1509

(7th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1471 (1990) (every theory of bankruptcy fraud need not be placed in separate count of indictment).

II. PETITIONER WAS NOT CONSTITUTIONALLY ENTITLED TO A ROBBERY INSTRUCTION AS A LESSER-INCLUDED OFFENSE OF MURDER.

A. STATE LAW MUST CONTROL THE DETERMINATION AS TO WHETHER OR NOT A LESSER-INCLUDED OFFENSE OF FELONY MURDER EXISTS.

In this case, the Arizona Supreme Court explained its ruling that robbery is not a lesser-included offense of felony murder:

> However, in Arizona there is no lesser-included offense to felony murder. Although we agree with the defendant that the evidence supported an instruction and conviction for robbery, we disagree that the underlying felony supporting a felony murder conviction requires a lesser-included offense instruction and form of verdict. [Citations omitted.]

State v. Schad, 788 P.2d 1162 at 1168 (Ariz. 1989).

Felony murder is defined as first-degree murder under Ariz.Rev.Stat. §13-1105 (Appendix).

State v. LeGrand, 734 P.2d 563 at 572 (Ariz. 1987), explained why no lesser-included offense to felony murder existed:

> It is well established that no lesser included offense to felony murder exists because the mens rea necessary to satisfy the premeditation element of first-degree murder is supplied by the specific intent required for the felony. Where no lesser included offense exists, it is not error to refuse the instruction. [Citations omitted.]

Under Arizona law, felony murder is a strict liability offense, as noted in State v. Ferrari, 541 P.2d 921 at 925 (Ariz. 1975) (opinion by Justice O'Connor).

State v. Hitchcock, 350 P.2d 681 at 687 (Ariz. 1960), explained the strict liability rationale for felony murder and upheld the jury instructions given by the trial court. The jury instructions stated in part:

> The defendant is charged in count one of the information with the crime of murder in the first-degree[.] . . . If you determine that the defendant was not engaged in the commission of a robbery at the time Ernest DeVito was killed, then you have no alternative but to acquit the defendant on count one of the information.

Thus, Arizona law has long provided that if the jury concludes that a defendant is not guilty of felony murder, the defendant may not be convicted of the underlying felony offense.

See also Woratzeck v. Ricketts, 820 F.2d 1450 at 1457 (9th Cir. 1987), vacated on other grounds, 486 U.S. 1051 (1988). The Fifth Circuit has also upheld a similar rule in Mississippi death penalty cases. Jones v. Thigpen, 741 F.2d 805 at 815-816 (5th Cir. 1984). The United States Constitution clearly permits the States to impose criminal liability under a felony murder rule. Lockett v. Ohio, 438 U.S. 586 at 602 (1978); Tison v. Arizona, 481 U.S. 137 (1987); Bethea v. Scully, 834 F.2d 257 (2nd Cir. 1987) [upholding felony murder conviction for reckless conduct causing death]; Conner v. Director of Division of Adult Corrections, 870 F.2d 1384 at 1387-1388 (8th Cir. 1989) [under Iowa felony murder rule it was unnecessary to prove that the defendant actually participated in the homicide but only that he participated in the underlying felony]; Washington v. Watkins, 655 F.2d 1346 at 1366, n.39 (5th Cir. 1981) [accident is not a defense to homicide committed in the perpetration or attempt to perpetrate a felony]. See also Torcia, Wharton's Criminal

Law, 14th Ed., Vol. II, §145-150, pp. 201-230, 1989 Cum.Sup., pp. 78-90.

In Bell v. Watkins, 692 F.2d 999 at 1004-1005 (5th Cir. 1982), the Fifth Circuit explained why the Court's opinion in Beck v. Alabama, 447 U.S. 625 (1980), did not require that Bell receive a jury instruction on lesser included offenses in a trial under the felony murder rule. The Court stated:

> The due process clause of the fourteenth amendment requires a trial judge to give a lesser included offense instruction to the jury "if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." Beck v. Alabama, [supra] (quoting Keeble v. United States, 412 U.S. 205, 208, (1973)). . . . There is no due process violation, however, unless there is some evidence to support an instruction on the lesser included offense. Hopper v. Evans, 465 U.S. 605 (1982); Roberts v. Louisiana, 428 U.S. 325 (1976).
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> * * *
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> The Alabama statute in question in Beck required a finding of intent to kill before a defendant could be convicted of capital murder. Since there was conflicting evidence on the issue of intent at trial, the State conceded that there was evidence to support a lesser included offense of "simple" felony murder. In contrast, any murder committed during the course of a robbery is capital under Mississippi

> law. Therefore, the trial court's refusal to give a lesser included offense instruction at Bell's request was proper, since there was no evidence to support the lesser charge. [Citations and footnotes omitted.]

Other States have held that the felony murder offense may not be split off to justify an instruction on the underlying felony as a lesser included offense. State v. Zeimet, 348 N.W.2d 338 at 342 (Minn. 1984); People v. Berzups, 402 N.E.2d 1155 at 1160 (N.Y. 1980); Ross v. State, 717 P.2d 117 at 121 (Okl.Cr. 1986), affirmed on other grounds, 487 U.S. 81 (1988); Woodkins v. State, 542 S.W.2d 855 at 858 (Tex.Cr. 1976), and Burns v. State, 556 S.W.2d 270 at 286 (Tex.Cr. 1977), cert. denied, 434 U.S. 935; State v. Cook, 332 S.E.2d 147 at 159-160 (W.Va. 1985).

A substantial number of States have held that in a felony murder case, a defendant is not entitled to instructions on lower degrees of homicide as lesser-included offenses. Brumbley v. State, 453 So.2d 381 at 386 (Fla. 1984); Conner v. State, 362 N.W.2d 449 at 454-457 (Iowa 1985); State v. Rueckert, 561 P.2d 850 at

855-858 (Kan. 1977); Commonwealth v. Evans, 454 N.E.2d 458 at 462-463 (Mass. 1983); State v. Reeves, 344 N.W.2d 433 at 442 (Nev. 1984); State v. Strickland, 298 S.E.2d 645 at 652-659 (N.C. 1983), and at 664-666 (Martin, J., and Mitchell, J., concurring); LeVasseur v. Commonwealth, 304 S.E.2d 644 at 657-659 (Va. 1983); State v. Frazier, 661 P.2d 126 at 132-133 (Wash. 1983); Richmond v. State, 554 P.2d 1217 at 1230-1233 (Wyo. 1976).

B. ROBBERY IS NOT A LESSER-INCLUDED OFFENSE OF FELONY MURDER UNDER THE STATUTORY ELEMENTS TEST SINCE FELONY MURDER MAY BE COMMITTED WITHOUT A ROBBERY.

Although as Petitioner has suggested, Harris v. Oklahoma, 433 U.S. 682 (1977), seems to hold that robbery is a lesser-included offense of felony murder, Harris was actually a case of successive prosecutions barred under the collateral estoppel rule (prosecution preclusion) defined by the Court in Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084 (1990). As the Court explained in Corbin, Harris established a second test in successive

prosecutions to bar a second prosecution in addition to the Blockburger v. United States, 284 U.S. 299 (1932), statutory elements test. Grady v. Corbin, 110 S.Ct. at 2092-2093. See United States v. Benton, 852 F.2d 1456 at 1464-1465 (6th Cir. 1988), cert. denied, 488 U.S. 993, rejecting the argument that the elements test requires narrowing the elements of "the applicable statutes to be analyzed until they include only the alternatives [specific facts] relevant to the case at hand." Robbery may be committed without committing murder; felony murder may be committed without committing a robbery. Hence robbery is not a lesser-included offense of felony murder as defined by this Court in Schmuck v. United States, 489 U.S. 705 at 719 (1989):

> To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.

C. THE STATES MAY IMPOSE THE BURDEN UPON THE DEFENDANT OF PRODUCING EVIDENCE TO SUPPORT A LESSER-INCLUDED OFFENSE INSTRUCTION; THE EVIDENCE DOES NOT ESTABLISH THAT PETITIONER'S TAKING OF THE VICTIM'S PROPERTY WAS A SEPARATE EVENT FROM THE HOMICIDE.

This Court has previously acknowledged the authority of the States to define the elements of criminal offenses. Martin v. Ohio, 480 U.S. 228 at 232 (1987). In Spaziano v. Florida, 468 U.S. 447 at 455-456 (1984), the Court noted:

> Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the [jury's factfinding] process. Beck does not require that result. . . . Requiring that the jury be instructed on a lesser included offense for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process.

In Hopper v. Evans, 456 U.S. 605 at 611-612 (1982), the Court explained the ruling in Beck v. Alabama, supra, in part as follows:

> Due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. A jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence. . . . The federal rule is that a lesser included offense

> instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208 (1973).

In Schmuck v. United States, supra, the Court revisited Keeble to determine the proper definition for a lesser included offense under F.R.Cr.P. 31(c), and concluded that the correct test was the statutory elements test. The Court stated in part, 489 U.S. 717:

> The Court recognized in Keeble v. United States, supra, that where the jury suspects that the defendant is plainly guilty of some offense, but one of the elements of the charged offense remains in doubt, in the absence of a lesser included offense instruction, the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction. [Emphasis added.]

Prior to the formulation of the test established in Keeble, the Court in Sansone v. United States, 380 U.S. 343 at 350 (1965), explained the test for a lesser-included offense instruction:

> In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is

> only proper where the charged greater offense requires the jury to find a <u>disputed</u> <u>factual</u> <u>element</u> which is not required for conviction of the lesser-included offense. [Emphasis added.]

Although in this case Petitioner argued before the jury that the robbery or theft of the stolen property found in his possession could have been a separate transaction from the homicide, he presented no evidence to support his argument that the homicide was unrelated to the theft of the stolen property which was ultimately found in his possession. The Due Process Clause permits the States to impose the burden upon the defendant of producing evidence to support a claim of fact made by the defendant during the jury trial so long as the prosecution bears the ultimate burden of proving the statutory elements beyond a reasonable doubt. <u>Patterson v. New York</u>, 432 U.S. 197 at 230-231 and at n.18 (1977) (Powell, Brennan and Marshall, J.J., dissenting):

> The State normally may shift to the defendant the burden of production, that is, the burden of going forward with sufficient evidence "to justify [a reasonable] doubt upon the issue." If

> the defendant's evidence does not cross this threshold, the issue . . . will not be submitted to the jury. [Citations and footnote omitted.]

As the Kentucky Supreme Court observed in Brown v. Commonwealth, 555 S.W.2d 252 at 257 (Ky., 1977):

> Whether one is referring to one of these affirmative "defenses" or to a lesser offense, the evidentiary situation and burden of proof are the same. Evidence suggesting that a defendant was guilty of a lesser offense is, in fact and in principle, a defense against the higher charge, though it is not a "defense" within the technical meaning of that term as used in the Kentucky Penal Code, cf. KRS 500.070. . . . Whatever may be its other infirmities, Mullaney v. Wilbur, 421 U.S. 684 (1975), does not stand for the proposition that the prosecution is required to produce evidence in negating every fact and circumstance that could serve either to reduce the degree of or to raise an absolute defense to the crime charged. Once there is evidence sufficient to create a doubt, yes -- then the state has a burden of proof and there must be an instruction so casting it. . . .

The facts found by the Arizona Supreme Court in this case do not support the Petitioner's suggestion that his theft of the deceased's victim's property was a separate event from the killing of the victim. The victim's death

permitted the victim's property (in particular the motor vehicle found in Petitioner's possession) to be stolen from the deceased victim's possession. See State v. Schad, supra, 788 P.2d at 1164; State v. Schad, 633 P.2d 366 at 370-373 and 381 (Ariz. 1981).

The States may impose a burden on the defendant in a criminal case of producing evidence to justify a lesser-included offense instruction. This burden is constitutionally permissible. Petitioner failed to produce evidence to support his contention that the homicide was a separate transaction or should be disassociated from the theft of the stolen property found in his possession. See Fleener v. State, 412 N.E.2d 778 at 782 (Ind. 1980).

CONCLUSION

WHEREFORE, the opinion below should be affirmed.

Respectfully submitted,

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APPENDIX

Arizona Revised Statute §13-1105.
First degree murder; classification

A. A person commits first-degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under §13-1405, sexual assault under §13-1406, molestation of a child under §13-1410, narcotics offenses under §13-3408, subsection A, paragraph 7 or §13-3409, kidnapping under §13-1304, burglary under 13-1506, 13-1507 or 13-1508, arson of an occupied structure under §13-1704, robbery under §13-1902, 13-1903 or 13-1904, escape under §13-2503 or 13-2504 or child abuse under §13-3623, subsection B, paragraph 1, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by §13-703.